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TREATISE

ON

DISCOVERY OF EVIDENCE,

BY

BILL AND ANSWER,

IN

EQUITY.

BY THOMAS HARE, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

LONDON:
HENRY BUTTERWORTH,
Law Bookseller & Publisher,
7, FLEET STREET;
AND R. MILLIKEN & SON, DUBLIN.

1836.

135
2

LONDON:
W. M'DOWALL, PRINTER, PEMBERTON ROW,
GOUGH SQUARE.

PREFACE.

THE founders of systems of judicial evidence have been compelled, at the outset of their undertakings, to elect between the principles of partial exclusion and universal reception of testimony. In adopting the first principle, they have attempted an estimate of the weight or 'proving power' of evidence, by a reference to the sources from whence it proceeds, and have interdicted the use of every kind of proof, which, according to their calculation, does not possess the necessary amount of force. In resorting to the other principle, all attempts to appreciate the importance of testimony by an invariable standard have been

neglected as illusory or discarded as vain; and the value of every proof has been left to the wisdom of the judge and the emergency of the occasion.

Unavoidable difficulties attend the application of either principle. The effect of the one is to limit the materials upon which judgment is to be formed, and, therefore, to lessen the labour of discrimination. The consequence of the other is to embark the judge in a wide field of inquiry, exacting a more than ordinary combination of knowledge, industry, and circumspection. The line which separates admissible from inadmissible evidence is necessarily arbitrary, and productive of many anomalies. Testimony of unquestionable value may chance to be without the standard of admissibility, and that which is utterly worthless may happen to be within it. The universal reception of evidence suggests many dangers. The expediency of a system is far from indisputable, if its applica-

tion demands more universal attainments and more inexhaustible energy than are the lot of any numerous class of men. If the restriction upon testimony would sometimes prevent the proof of a fact, the absence of restriction may often lead to the establishment of a falsehood. There would be a temptation to speculate on the possibility of error; and truth might be suppressed or stifled in a mass of unimportant and fabricated evidence.

Of these conflicting evils, with which the imperfection of human faculties taints the most solemn of human institutions, the law of England has chosen the least repugnant to the civil polity of the English nation. There is a pervading jealousy of discretionary power, that extends even to the judicial seat; and the jury is interposed between the magistrate and the people. The principle of a popular selection of those who are to determine upon disputed facts, is

necessarily satisfied by the possession of popular attainments. Some limit is required to the admissibility of evidence which should be offered to their consideration. A multitude of decisions upon oral and written testimony have constituted permanent rules for the admission or rejection of evidence. Partiality, a motive which eludes detection, has been ascertained by prescribed tests; and authenticity, a quality naturally indeterminate and fluctuating, has been fixed by invariable rules. The paradox is remarkable, but the advocates of the system refer with confidence to its result. The administration of justice in England has produced a personal security without fear of aggression, and an enjoyment of the fruits of individual industry, without apprehension of disturbance, of which history affords but few examples.

A witness who would obtain a pecuniary advantage, or be subjected to a

pecuniary loss, according to the event of the trial, is assumed to be deficient in impartiality, and is excluded as incompetent. In this principle of evidence is involved the exclusion of the parties on the record, who commonly possess the deepest interest. A necessary adjunct to the rule is the maxim of the common law, NEMO TENETUR PRODERE SEIPSUM; for, without it, the rule itself would be either abrogated, or might be made an instrument of injustice. The truth of the facts upon which a party relies may, however, be in the knowledge of his adversary, or may be rendered manifest by evidences in his possession. Hence arises the jurisdiction of equity in compelling a DISCOVERY. In this jurisdiction the plaintiff is entitled to call for every necessary proof, and the defendant is permitted to insist upon every just protection. The party who demands the discovery is not bound to peril his case upon the good faith of his

adversary; for he may exercise his discretion upon offering as evidence the proofs which he has elicited. The party who gives the discovery may, in his answer, accompany it with the explanation which is proper for his own security, in the event of his admission being used against him.

A process not dissimilar in method or design was known to the civil law, and adopted in the *pays de droit écrit*. It is mentioned in the work of Domat, as one of the modes of obtaining the confession of a party. "And this hath its use in the cases where he who wants to prove a fact, having no proofs thereof, and not being willing to refer it to the oath of his adversary, demands that he be interrogated by the Judge upon facts which he draws up in the form of a libel or allegation, dividing it into several articles, and inserting therein the fact in question, and other facts and circumstances which may have relation thereto,

and serve to prove it. And if the Judge find that the said facts or circumstances upon which it is desired that the party may be interrogated, may serve to prove the fact in question, he orders the party to be interrogated, and to make oath that he will speak the truth of all that he knows concerning every one of the articles; and the answers are taken down in writing; from which, he who demanded them, draws the consequences which may turn to his advantage, whether it be by the confessions, or denials, or variations of the party who has been interrogated."

A system of judicial inquiry would be obviously defective, which had no means of obtaining a confession and production of evidences from the parties themselves. A system which should set no bounds to the power of scrutiny would be fertile in expedients of oppression. It is not by making the party a defendant in a court of justice that his

civil rights are cancelled. The abolition of such an inquisitorial practice in this country was considered worthy of being one of the objects of a national struggle. "I am afraid," said Lord Hardwicke, "if the court should overrule this plea, it would be setting up the oath *ex officio*, which then the parliament, in the time of Charles the First, would in vain have taken away."

Sir William Blackstone adverts to the mode of proof in equity, by means of the compulsive discovery upon oath, as the first and most fruitful source of equitable jurisdiction. The doctrines of discovery possess an importance, and have attained a magnitude, that entitle them to form a distinct head in jurisprudence. They are the result of that scrupulous care with which a long succession of eminent Judges have asserted the powers of judicial investigation, without sacrificing the security and secrecy which all are entitled to claim and to preserve.

They define and reconcile the rights of individual privacy, and the demands of public justice. It is, therefore, not merely from their practical application to the business of our courts of equity, that these doctrines deserve to be regarded. They express the extent of the privilege, which the circumstance of becoming a litigant should confer, of requiring from the opposite party the confession of facts, and the liberty of examining written evidences. The forms of procedure may be various or changeable, but the necessity and the limits of discovery are identified with the administration of civil justice, and depend upon principles which are perpetual.

T. H.

4, NEW SQUARE, LINCOLN'S INN.

December, 1835.

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ERRATA.

Page 161, note, *for* 2 Bro. C. C. *read* 1 Bro. C. C.
224, line 15, *after* plaintiff, *insert* in his bill.
252, line 14, *dele* to *before* the court.

TREATISE ON DISCOVERY.

PART I.

CHAPTER I.

OF THE DISTINCTION BETWEEN DISCOVERY AND RELIEF, AND OF THE EFFECT OF THAT DISTINCTION IN PLEADING.

SECTION 1.

Arrangement of the subjects of Discovery and Relief in the present and in former Treatises.

A PLAINTIFF in equity is entitled to an answer from the defendant to the allegations upon which the claim to relief is founded, whether that relief be at law or in equity, and whether the plaintiff could prove his case by other means, or is destitute of the means of establishing it. It is therefore one of the purposes of every bill in equity to obtain this answer or confession, and thereby to aid the effect of the other evidence which may be produced, if it does not render other evidence unnecessary. Thus the objects of discovery and relief have become blended. It is now attempted, for the first time, to separate the doctrines on these subjects, regarding

the one as a branch of procedure, and treating the other as belonging to the department of evidence. The arrangement of the principles relating to discovery in the present work necessarily differs in many respects from that adopted in the treatises on pleading, and these differences it will be desirable to explain, to facilitate reference to the respective subjects.

In treating of the various modes of defence to a bill (*a*), Lord Redesdale examines, first, defence to relief, which, he observes, frequently includes discovery; and, secondly, defence to discovery only, which sometimes, he adds, consequentially affects the relief (*b*). This division has been often mistaken for a separation of bills for relief from those which seek discovery merely; but the classification is founded not upon the kind of bill, but upon the extent of the demurrer or plea. It is true that a defence of the first nature is applicable to bills for relief only, but the second embraces every species of suit without distinction. The arrangement of Lord Redesdale in this respect has been generally pursued.

There are many objections to bills for relief, which are also equally valid to bills for discovery; but some of these objections, though substantially the same in both cases, have a very different shape when they are offered to the latter, from that which they assume when raised to the former kind of bill.

(*a*) Ld. Red. Tr. 4th ed. 106, et seq. (*b*) Id. 109, 218.

There are grounds of defence to mere bills of discovery which have no application to suits for equitable relief. Again, there are grounds upon which the defendant, without any general defence to the suit, may yet refuse to answer a particular question or to make particular disclosures. Objections of the last kind apply equally to all suits.

Shortly after the publication of the second edition of Lord Redesdale's work, the case of *Price* v. *James* (*c*) occurred, in which Lord Thurlow laid down the principle, which is examined more at length in a subsequent page (*d*), that a demurrer, which is good to the relief prayed, is a defence also to the discovery. This principle assists the division of the subject. When the bill seeks equitable relief, and the defendant demurs to the relief, the question of discovery does not now occur. The decision is governed by the principles upon which the court administers relief. The same may be said where the suit is met by a plea to the relief; except that a partial answer may then happen to be necessary to accompany the plea. The examination of the cases where this is required, together with the operation of the rule which has been mentioned, is the business of the first part of the present work. The second part relates to those kinds of defence which may be made to a bill of discovery only, and to their nature as distinguished from similar kinds of defence to equitable relief. In the third part

(*c*) 2 Bro. C. C. 319. (*d*) Sect. 3.

are comprehended the objections which, not extending to an entire bill, or not directed to the propriety of the suit *in limine*, yet afford a protection against particular disclosures, whether sought in a bill for relief or for discovery merely. And the last part is devoted to the examination of the rules which have been laid down with regard to the form and manner in which a defendant may take the several objections to discovery.

Section 2.

Of Defence to Discovery only, where the Bill prays Relief.

The rule upon this point is thus expressed by Lord Thurlow:—"You cannot demur to a discovery unless you demur to the relief; for then you do not demur to the thing required, but you demur to the means by which it is to be obtained (*e*)." If the party has a right to relief in equity, he has a right to an answer from the defendant to every allegation of his bill, the admission of the truth of which, or the proof of the truth of which is necessary to entitle him to that relief (*f*). The meaning of these passages is, that the title to relief being supposed, no general objection can be raised to a discovery of the grounds upon which it should

(*e*) *Morgan* v. *Harris*, 2 Bro. C. C. 124; Ld. Red. Tr. 184; *Waring* v. *Mackreth*, Forrest. 38. Ex. R. (1802) 129.

(*f*) Per Lord Eldon, 6 Ves.

proceed. Many special objections may, however, be taken by demurrer, by plea, and sometimes by answer, to certain disclosures for which the bill may happen to call, notwithstanding the defendant does not meet the entire suit *in limine* (*g*). It will be unnecessary to do more than recapitulate here the several defences to discovery which may be applicable in these cases; for, as they involve some very important considerations, all objections of this nature are made the subject of a distinct part (*h*). These special objections are reducible to four principal heads, which therefore require to be regarded as exceptions to the above rule of Lord Thurlow:— 1. That an answer may subject the defendant to penal consequences. 2. That it is immaterial to the purpose of the suit. 3. That it would involve a breach of some confidence, which it is the policy of the law to preserve inviolate. And, 4. That the matter which is sought to be discovered appertains to the title of the defendant, and not to that of the plaintiff.

It is scarcely necessary to add, with respect to the foregoing objections to discovery, in whatever form they may be taken, that, whether they extend to cover a part or the whole of the allegations in the bill, they cannot sustain a general demurrer to relief as well as to discovery. The plaintiff may be entitled to relief, without being entitled to it through the discovery, and may obtain a decree, though he

(*g*) Ld. Red. Tr. 185. (*h*) Part III.

has not established his right by the defendant's answer (*i*).

Section 3.

Of the Rule that where a Bill prays Discovery and Relief, a Demurrer, which is a Defence to the Relief, extends also to the Discovery.

A practice at one period obtained, in cases where a plaintiff prayed by his bill relief to which he was not entitled, and it happened that he shewed a title to discovery, to compel the defendant to answer; the bill being then considered as in effect a bill for discovery merely (*k*). This practice does not appear to have been at any time universal (*l*), and, being often resisted, it was probably made to depend upon a consideration of the circumstances of each case. Lord Thurlow expressed much doubt as to the course of the court, and thought it incumbent on the plaintiff to know what he prayed, and that, therefore, if he prayed relief, where he was entitled to discovery only, the defendant might take advantage of it by a general demurrer, and the bill should be dismissed (*m*). Upon the next case that came before the court, in which the point was raised, he

(*i*) *Attorney-General* v. *Brown*, 1 Swans. 294; *Dummer* v. *Corporation of Chippenham*, 14 Ves. 255.

(*k*) *Watkins* v. *Bush*, Dick. 663; *Sloan* v. *Heatfield*, Bun. 18; *Lord Grey* v. *Grey*, Rep. t. Finch, 244; Ld. Red. Tr. 183; 10 Ves. 553.

(*l*) *Ridgely* v. *Hole*, cited 2 Bro. C. C. 281; *Measter* v. *Brampston*, cited Id. 282.

(*m*) *Fry* v. *Penn*, 2 Bro. C. C. 282.

allowed the demurrer, observing that, upon consideration of the subject, he thought it incumbent on the plaintiff to shape his bill according to what he had a right to pray (*n*).

Since this period the rule has been acknowledged and adopted in a long current of authorities, that, to support a general demurrer to a bill seeking both discovery and relief, it is sufficient to shew that the plaintiff is not entitled to the relief which he prays; and that, therefore, the addition of a prayer for relief to a bill seeking discovery will render that discovery dependent upon the title to relief (*o*).

It has been suggested, that, in order to the defendant's being thus able, by demurrer, wholly to protect himself against the interference of the court, it must appear, from the manner in which the plaintiff states his case, that he seeks the discovery as incidental to the relief (*p*). It would however seem, that,

(*n*) *Price* v. *James*, 2 Bro. C. C. 319.

(*o*) *Collis* v. *Swayne*, 4 Bro. C. C. 481; *Charles* v. *Taysum*, Ex. July, 1792, cited Id.; *Renison* v. *Ashley*, 2 Ves. jun. 459; *Loker* v. *Rolle*, 3 Ves. 3; *Ryves* v. *Ryves*, 3 Ves. 343; *E. I. Comp.* v. *Neave*, 5 Ves. 185; *Muckleston* v. *Brown*, 6 Ves. 63; *Barker* v. *Dacie*, 6 Ves. 686; *Hodgkin* v. *Longden*, 8 Ves. 3; *Baker* v. *Mellish*, 10 Ves. 544; *Gooden* v. *Simpkinson*, 11 Ves. 509; *Corp. of Carlisle* v. *Wilson*, 13 Ves. 276; *Todd* v. *Gee*, 17 Ves. 273; *Pitts* v. *Short*, 17 Ves. 213; *Hodle* v. *Healey*, 1 V. & B. 539; *Albretcht* v. *Sussman*, 2 V. & B. 323; *Williams* v. *Steward*, 3 Mer. 502; *Jones* v. *Jones*, 3 Mer. 161; *Att.-Gen.* v. *Brown*, 1 Swans. 294; *Armitage* v. *Wadsworth*, 1 Madd. 193; *Angell* v. *Angell*, 1 Sim. & St. 93; *Frietas* v. *Dos Santos*, 1 Y. & J. 576; *King* v. *Rosset*, 2 Y. & J. 36; *Mellish* v. *Richardson*, 12 P. 530.

(*p*) Ld. Red. Tr. p. 184, n. (*m*).

to take a case out of the foregoing rule, the discovery must be shewn to have a distinct object. Where a bill prays relief, the discovery, if material to the relief, is incidental to it (*q*), and it has been held that, *primâ facie*, it must be so intended (*r*). It is only by the introduction of expressions in the bill, making the discovery a substantive part of his case, that the plaintiff can avert the operation of the rule, and this would scarcely be effected by merely avoiding to connect the discovery with the relief sought.

It may admit of doubt whether any expressions would be sufficient to entitle a plaintiff to discovery, if they formed part of a bill praying relief, and a demurrer or plea to the relief was successfully offered, unless the relief were merely ancillary to a trial elsewhere.

The rule which protects a defendant from answering where a demurrer is a good defence to the relief, is founded upon the convenience of the defendant, and he may waive it. Lord Eldon held that he could demur to the relief, and give the plaintiff the assistance of the discovery, saying, in effect, that he would contest the right at law, and be ancillary as a volunteer by giving a discovery of the facts upon which the plaintiff would have occasion to go to law (*s*). But though a defendant may

(*q*) Ld. Red. Tr. 185; *Baker* v. *Mellish*, 10 Ves. 553; 2 Bro. C. C. 10.

(*r*) *Angell* v. *Angell*, 1 Sim. & St. 93; contra, *Gait* v. *Osbaldeston*, 5 Madd. 428, but reversed, 1 Russ. 158.

(*s*) *Hodgkin* v. *Longden*, 8 Ves. 4; *Todd* v. *Gee*, 17 Ves. 273. See also *Barker* v. *Dacie*, 6 Ves. 681.

answer the whole bill, demurring to the relief, it has been determined that he cannot plead or demur to the relief, and to a part of the discovery only, and at his pleasure answer the rest (*t*), for such a partial answer can serve no useful purpose; and comes within the rule, which will be examined hereafter, that he who submits to answer must answer fully (*u*).

It has recently been decided, that if the specific relief fails, the prayer for general relief will support the discovery (*v*).

If general demurrers be overruled as to some defendants, and allowed as to others, the rule is a defence to any discovery by the latter (*w*).

In a case where the bill prayed a discovery of a deed which had been delivered up by the plaintiff to the defendant and cancelled, the plaintiff being then in ignorance of the breach of one of its covenants, and the demurrer went both to discovery and relief, Lord Eldon is reported to have said, that as far as it was a demurrer to the discovery it covered too much. "For, upon all the authorities where the case calling the party into this court is, that the contract is not in that state, and not by any fault of his, that he can avail himself of it at law, the discovery whether the contract existed or not cannot furnish of itself cause of demurrer, unless the defendant can go further, and state that no re-

(*t*) *James* v. *Sadgrove*, 1 Sim. & St. 4; *Williams* v. *Olive*, cited 18 Ves. 178.

(*u*) Part IV.

(*v*) *Deare* v. *Att.-Gen.*, 1 Y. & Coll. 205.

(*w*) *Baker* v. *Mellish*, 10 Ves. 544.

lief can be had upon it any where, and then, from the mere circumstance of the demurrer extending too far, to the discovery to which the plaintiff is entitled, the court will not, on that account, overrule the demurrer (*x*)." This would appear, at a first view, to abridge in some degree the operation of the rule now under consideration. From the concluding part of the judgment it may, however, be inferred that some kind of relief in equity was contemplated by the court, and then the reasoning in question only imports, that the defence to relief must be a complete and valid defence to the case as it stands admitted on the record, or a demurrer cannot be sustained (*y*).

It remains to add, that the treatise of Lord Redesdale contains several passages implying a contradiction to this rule, and as that work is of great authority on the subject of which it treats, they cannot properly be passed without notice. These passages will be found to have been introduced in the first and second, and then continued in the subsequent editions of that work, it not being consistent with the plan of the last edition to withdraw any part of the text (*z*). The rule under discussion had its confirmation in the case of *Price* v. *James* (*a*), decided in the year following that of the publication of the second edition of Lord Redesdale's treatise,

(*x*) *E. I. Comp.* v. *Neave*, 5 Ves. 184.

(*y*) *Todd* v. *Gee*, 17 Ves. 279.

(*z*) See the Preface to the fourth edition.

(*a*) 2 Bro. C. C. 319.

which, in this respect, therefore, so far as it may be considered an authority, is necessarily superseded by that case and the train of decisions which have proceeded in accordance with it.

Section 4.

Of the like Rule where the Defence is by Plea.

If the absence of a title to relief be not apparent on the face of the bill whereby the defendant might demur, the defence may be made by plea; and a plea that is sufficient to bar the relief is a bar also to the discovery (*b*). In these cases, however, there may be particular charges in the bill not covered by the plea, and which must therefore be answered. Answers of this kind, to accompany or support a plea, are the subject of the next chapter (*c*).

Section 5.

Of Prayers which are deemed to constitute Prayers for Relief.

Some difficulty has been found in defining the term *relief* in the sense in which it should be understood in the foregoing rules. There are some kinds of equitable aid or relief which may be sought in a bill, the main purpose of which is the discovery of

(*b*) *Sutton* v. *Earl of Scarborough*, 9 Ves. 75. See Ld. Red. Tr. 270.

(*c*) Chap. II.

evidence, and where the refusal of that relief is not decisive upon the discovery. It is very important, however, to distinguish the aid which may be prayed without falling within the operation of the rule discussed in the two last sections.

The principle upon which the respective boundaries of these branches of equitable jurisdiction may be readily defined seems to be inferred from that passage of Lord Redesdale's treatise, where it is observed, that, "to administer to the ends of justice without pronouncing any judgment which may affect any rights, the courts of equity in many cases compel a discovery which may enable other courts to decide on the subject (*d*)."

The court cannot pronounce any judgment on the rights of the parties, but upon a hearing of the cause. It follows, therefore, if any exercise of the jurisdiction of the court be prayed, which involves the necessity of a hearing and decree or decretal order (*e*), the suit is thereby rendered a suit for relief, and is liable to all the incidents of that proceeding. On the other hand, if the assistance which is prayed in addition to the discovery be such as the court will give without a hearing, and no decree or decretal order be necessary, no judgment upon any rights being required, the rule which has been discussed in the two preceding sections does not apply to such a prayer. The decided cases appear distinguishable upon this principle.

A prayer for a commission to examine wit-

(*d*) Tr. 148. (*e*) 6 Ves. 290.

nesses (*f*), or that the testimony of witnesses be perpetuated (*g*), may be added to a bill of discovery, and does not make it a bill for relief.

In the case of *Angell* v. *Angell* (*h*), the bill prayed a commission to examine witnesses abroad to perpetuate testimony; and it would seem, by the observations of Sir John Leach, V. C., that he considered this prayer to constitute relief, and to bring the bill within the rule stated in the preceding chapter, by making the discovery dependent upon the title to the particular aid which is prayed, unless the plaintiff should introduce expressions making the discovery a substantive and independent part of his case. He seemed to consider that it was incumbent upon the plaintiff, seeking discovery independently of the rest of his prayer, to adopt a form of expression distinguishable from the common form of interrogatory, thereby to indicate his intention. This may be an useful rule, and if it be necessary in this case, it seems equally necessary in all others where the prayer is not so evidently a mere consequence of the discovery as to obviate all occasion for this precise indication of the plaintiff's object.

(*f*) *Noble* v. *Garland*, 19 Ves. 376; *Lousada* v. *Templer*, 2 Russ. 561; *King* v. *Allen*, 4 Madd. 247; *Thorpe* v. *Macauley*, 5 Madd. 218. See Prec. Cha. 532; 19 Ves. 375.

(*g*) *Hall* v. *Hoddesdon*, 2 P. Wms. 162; *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316; *Rose* v. *Gannell*, 3 Atk. 439. It follows, that in *Knight* v. *Knight*, 4 Madd. 8, the word relief in the demurrer was not strictly necessary, if not improper. *Asgill* v. *Dawson*, Bunb. 70; 17 Ves. 213; 4 Bligh, P. C. 125.

(*h*) 1 Sim. & St. 83.

It should be observed in this case, that there was a prayer for general relief, which must have rendered the object of the bill ambiguous, though it is not expressly noticed by the vice-chancellor.

It is evidently a consequence, and necessary to the usefulness of a bill of discovery, that it may contain a prayer for the injunction against either the plaintiff (*i*) or defendant (*k*) at law to stay proceedings there until the discovery shall be made (*l*).

An injunction to restrain the defendant from setting up outstanding terms on the trial of an ejectment is such relief as cannot be granted upon motion (*m*), but involves the necessity of a hearing and a judgment upon the equitable rights of the parties. A prayer for this relief cannot be introduced in a bill of discovery without changing its character, and subjecting it to the rules applicable to suits for relief (*n*).

A prayer for the delivery of deeds to the plaintiff is clearly for relief; for there must be a hearing (*o*) and decree or decretal order directing that deli-

(*i*) See Eden, Tr. Injunctions, p. 78, et seq.

(*k*) *Brandon* v. *Sands*, 2 Ves. jun. 514; *Brandon* v. *Johnson*, 2 Ves. jun. 517, injunction against obtaining judgment as in case of nonsuit.

(*l*) Lord Red. Tr. 53.

(*m*) *Hylton* v. *Morgan*, 6 Ves. 293; *Byrne* v. *Byrne*, 2 Sch. & Lef. 537; *Barney* v. *Luckett*, 1 Sim. & St. 419; *Northey* v. *Pearce*, 1 Sim. & St. 420.

(*n*) *Hylton* v. *Morgan*, 6 Ves. 296; *Baker* v. *Mellish*, 10 Ves. 549; *Jones* v. *Jones*, 3 Mer. 172; *Armitage* v. *Wadsworth*, 1 Madd. 193; *Jermy* v. *Best*, 1 Sim. 375. This was held otherwise in *Gait* v. *Osbaldeston*, 5 Madd. 428, but the decision was reversed, 1 Russ. 158.

(*o*) *Aston* v. *Aston*, 3 Atk. 302.

very (*p*); but a prayer for production of deeds in court seeks no more than that assistance which, in a proper case, may be obtained upon motion, where the bill is for discovery only (*q*); and accordingly it has been held, that the prayer that the defendant may set forth a list of deeds, and that they may be placed in the hands of the clerk in court for inspection, is incidental to the discovery, and does not make it a bill for relief (*r*).

There is, however, a class of cases, where a prayer of the nature of that which has been last adverted to, is a prayer for relief. This is not any exception to the foregoing rule, for that rule applies only to bills of discovery properly so called, and which are entertained merely to aid some judicial inquiry. If a party comes into equity, therefore, seeking the inspection of deeds, not as discovery in aid of any tribunal, but merely for the purpose of information, or to enable him to deal with the property to which they relate, his object is clearly to obtain that assistance which is properly relief. Under this head fall the cases of reversioners and remainder-men seeking to inspect deeds in the hands of the tenant for life, for the purpose of disposing of their interests under them (*s*). The bill then depends upon the

(*p*) *Aston* v. *Lord Exeter*, 6 Ves. 290.

(*q*) See *Barker* v. *Ray*, 5 Mad. 65.

(*r*) *Crow* v. *Tyrrell*, 2 Madd. 408.

(*s*) *Noel* v. *Ward*, 1 Madd. 322; *Shaw* v. *Shaw*, 12 Pri. 163; *Lord Lemspter* v. *Lord Pomfret*, Amb. 154; S. C. 1 Dick. 238.

title to the relief sought, which is not here the subject of inquiry.

It is a necessary part of the order upon bills of discovery that the deeds or papers which are incorporated in the answer may be produced as evidence at the trial. This is but to make the discovery effectual, and cannot be a prayer for relief (*t*).

A prayer for an account renders the bill a bill for relief (*u*).

Section 6.

Of the Prayer for General Relief, and the Prayer of Process.

The effect of the formal prayer at the conclusion of bills for relief in equity, that the complainant "may have such further and other relief as the circumstances of the case may require, and to the court may seem meet," and of the words in the prayer of process, that the defendant "may abide such order and decree" as the court shall make, cannot be determined upon the principle which has been suggested. These forms do not point to any definite object, and may possibly be construed to import nothing more than aid which is incidental to the former part of the bill, and which the court may

(*t*) 13 Ves. 243; 6 Ves. 289; 3 Madd. 486; 15 Ves. 188.

(*u*) *Corporation of Carlisle* v. *Wilson*, 13 Ves. 276; *Frietas* v. *Dos Santos*, 1 Y. & J. 576. In the judgment, the words relief and discovery are transposed. *King* v. *Rosset*, 2 Y. & J. 36.

grant without a hearing or a judgment (*v*). This is not, however, the primary or common construction. They may comprehend an exercise of the jurisdiction of the court beyond that which is merely consequent upon discovery. The prayer for general relief is very comprehensive (*w*), and will support the discovery, even if the specific relief should fail (*x*). It would also give the plaintiff the opportunity to amend by adding prayers for specific relief (*y*), and lead to that confusion of the jurisdiction on relief and discovery which it has been sought to avoid (*z*).

The prayer for general relief in a bill by assignees for discovery of money, which the bankrupt had lost at play, was held not to render it a suit for relief (*a*). "That case," observed Graham, B., "has often since its determination been referred to as establishing a precedent. On being looked at, however, it will be found to be one of particular circumstances (*b*)." The decision he considered to be founded on the ground, that it was not possible the bill could be a bill for relief, for no relief could have been given in equity. But if a plaintiff were permitted to introduce the prayer whenever he had not an equitable case, he certainly would not be restrained from inserting it when his relief was in equity, and there

(*v*) *Whitworth* v. *Goulding*, Ab. Eq. Ca. 14, pl. 4; *Brandon* v. *Sands*, 2 Ves. jun. 516.

(*w*) See 1 Eden, 26; 3 Russ. 171.

(*x*) *Deare* v. *Attorney-General*, 1 Y. & Coll. 205.

(*y*) 6 Sim. 31.

(*z*) See Sect. 8.

(*a*) *Brandon* v. *Sands*, 2 Ves. jun. 516.

(*b*) 8 Price, 522. See 2 Fonbl. Tr. Eq. p. 6; Cooper, Pl. Eq. p. 188.

would be then no class of bills from which it would be excluded. It would have the effect, from which it has been desired to guard, of imposing upon the court the necessity of inquiring in every case, before the defendant could obtain his costs, whether any title to equitable relief existed (*c*). And the point seems now to be decided, that the prayer for general relief subjects the bill to all the incidents of a suit for relief, and therefore, if the title be at law, renders the bill liable to demurrer (*d*).

With regard to the common words in the prayer of process, the authorities are more conflicting, and the principle is not so obvious. The defendant to a mere bill of discovery is frequently required to abide the "order" of the court, as in the production of documentary evidence and other cases. It would seem that the "decree" of the court cannot be pronounced upon a bill of discovery, if by "decree" is to be understood the solemn decision of the court upon a hearing. A demurrer to a bill of discovery containing these words has been allowed in a recent case (*e*), and the opinion of Lord Hardwicke, together with the practice of draftsmen in equity, is against their insertion (*f*).

(*c*) 1 Younge, 200.

(*d*) *Angell* v. *Westcombe*, 6 Sim. 31; *Dormer* v. *Fortescue*, 2 Atk. 282; 3 Atk. 124. See also 6 Ves. 288, per Lord Eldon. Contrà *Whitworth* v. *Golding*, Ab. Eq. Ca. 14, pl. 4; *Brandon* v. *Sands*, 2 Ves. jun. 516. In *Angell* v. *Angell*, 1 Sim. & St. 83, Sir J. Leach, V. C., seems to omit this point.

(*e*) *Ambury* v. *Jones*, 1 Younge, 199.

(*f*) See *Rose* v. *Gannel*, 3 Atk. 439; *Mellish* v. *Richardson*, 12 Pri. 534. Contrà, *Crow* v. *Tyrrel*, 2 Madd. 406, 408. In *Angell* v. *Westcombe*, 6 Sim. 31, it is considered not demurrable.

Section 7.

Of the Effect of Bills of Discovery and Bills for Relief after Answer.

When a party has obtained a discovery in a court of equity, if he then prosecutes or defends the action at law, he may avail himself of the discovery by reading the answer as evidence there, or he may proceed without it. It is of no other avail than as an admission on oath by the defendant to the bill. The court has pronounced no opinion on the rights of the parties; for if the sole object of a suit is to obtain a discovery, there can be no proceeding beyond an answer by which the discovery is obtained (*g*), except an order for the production of such deeds and papers as are admitted by the answer to be in the possession or power of the defendant (*h*). Under an order the plaintiff can only read at law, by the direction of the court, what he may read without that direction, the answer; and, as part of that answer, he may read every book, letter, memorandum, or paper referred to by it, and which is in effect and substance part of it (*i*). Without an order for the production of papers at the trial, which form a part of the answer, the assistance of the court would often fall short of a full

(*g*) Ld. Red. Tr. p. 16.

(*h*) See Newland, Cha. Pr. 297, 3rd ed.; *Barnet* v. *Noble*, 1 Jac. & W. 227; *Evans* v. *Richards*, 1 Swan. 7.

(*i*) *Marsh* v. *Sibbald*, 2 Ves. & B. 376.

discovery: to extend the order beyond the mere production, subject to any objections to which the evidence may be liable, would be in effect to pronounce a judgment on the case.

It is a consequence of framing the bill for discovery merely, that the defendant is entitled to an order for his costs immediately upon putting in a full answer (*k*). The question whether the answer be sufficiently full is determined by the time having expired which is allowed to the plaintiff to except (*l*). The defendant is also entitled to the costs of resisting motions made by the plaintiff in the course of the discovery suit (*m*).

It has been seen that a party who is entitled to discovery, and goes on to pray relief, may be out of court if a defence by demurrer, or by a plea of which the plaintiff cannot disprove the truth, be taken and allowed. In such a case he has no other course than to file a new bill, unless he can shew a special ground entitling him to amend (*n*). It is, however, possible that the defendant may answer the bill. In such a case the irregularity in the frame of the suit cannot affect the admissibility of the answer as evidence at law (*o*); but if the plaintiff stands in need of documentary evidence to complete the an-

(*k*) *Coventry* v. *Bentley*, 3 Mer. 677; *Hibberson* v. *Fielding*, 2 Sim. & St. 371.

(*l*) Ld. Red. Tr. 201, and cases cited.

(*m*) *Noble* v. *Garland*, 1 Madd. 344. See *Grant* v. *Jackson*, Peake, N. P. C. 204.

(*n*) See next Section.

(o) See 1 Campb. 30; 2 B. & Adol. 284; 1 Phill. Tr. Ev. 359, 7th ed.

swer, he will be unable to obtain any order for its production at the trial. His suit is for relief, and relief can only be obtained upon a hearing and decree. A plaintiff in equity is not permitted to take his relief piecemeal, part by motion and part by decree (*p*). Where a plaintiff seeks equitable relief, and in the course of the suit an issue is directed, or an action brought under the direction of the court of equity, the trial is directed in such a way that all productions which the court conceive to be useful upon that trial, the creature of its own direction, shall be made (*q*). In proceeding under the control of the court, the production is ordered on both sides by a decree, or decretal order, upon a hearing. But if the plaintiff comes for equitable relief, and then chooses to proceed at law, the court will not, in the suit for relief, give any directions ancillary to the trial at law not under its control (*r*). There are, said Lord Eldon, two ways of proceeding: "You may get a discovery in aid of an ejectment; but if you will have equitable relief to aid the trial of your title at law, you must have that relief upon a decretal order prior to the trial at law. The party without the control of the court chooses what his proceeding shall be, and then he will probably drop the bill, and it will have the effect of a mere bill of discovery. If the party chooses to file a bill of dis-

(*p*) *Hylton* v. *Morgan*, 6 Ves. 296.

(*q*) *Marsh* v. *Sibbald*, 2 Ves. & B. 375.

(*r*) *Hylton* v. *Morgan*, 6 Ves. 294; *Aston* v. *Lord Exeter*, Id. 291. See *Worsley* v. *Watson*, cited 6 Ves. 289.

covery, be it so; but if he chooses to file a bill for relief, and take his chance of obtaining it, it is very difficult to make out that the court is to aid him in any step meaning to drop the relief, and to make it a mere bill of discovery, but not apprizing the court of that purpose (*s*)."

It follows, therefore, that if deeds or papers admitted by the answer to be in the defendant's hands be needed as evidence at the trial, the plaintiff, having prayed relief, has precluded himself from obtaining an order in equity for their production. This does not, however, apply to the case of a plaintiff in equity, who proceeds for relief there in consequence of actions brought against him at law. The documents being in the hands of the clerk in court, he will be ordered to produce them at the trial of an action brought against the same plaintiff by a third party (*t*); or at the trial of an indictment preferred by the plaintiff himself (*u*).

Section 8.

Of the Amendment of Bills for Discovery and Bills for Relief, by adding or expunging the Prayer for Relief.

It is stated to have been formerly a frequent practice to frame a bill for discovery only in the

(*s*) *Hylton* v. *Morgan*, 6 Ves. 293. Contrà, *Worsley* v. *Watson*, cited 6 Ves. 289.

(*t*) *Taylor* v. *Sheppard*, 1 Y. & Coll. 284.

(*u*) S. C. Id. 280. See *Marsh* v. *Sibbald*, 2 Ves. & B. 375.

first instance; and, having obtained it, by amending the bill, to try the title to relief (*v*). This practice has been long discontinued. Lord Eldon observed that he had no recollection of such an amendment; which, if it were allowed, must have been of constant occurrence; and he inquired if a single order could be found taking the distinction between the costs as costs while the bill stood upon the record as a bill for discovery, and the costs after it had become a bill for relief: whether there was any instance of the costs given before the amendment, or when leave to amend was granted, or when the amendment was made; or any decree in which the court took notice that the bill had been a bill of discovery, and afterwards a bill for relief, giving the costs distributively between the plaintiff and the defendant according to the nature of the case from time to time (*w*). And it was held, that if the plaintiff had his choice to begin with a bill for discovery or for relief, some remarkable degree of convenience ought to appear before the court would agree to change the practice; as in a case where the answer might furnish ground for supposing that the relief was in equity and not at law: the amendment being then the subject of a special application, and not a motion of course (*x*). Where, therefore, the equity of the plaintiff has appeared upon some disclosure in the answer of the defendant, the amendment has

(*v*) Ld. Red. Tr. 184, n. (*n*).

(*w*) 15 Ves. 362; 1 Ves. & B. 550.

(*x*) *Butterworth* v. *Bailey*, 15 Ves. 363; Ld. Red. Tr. 201.

been allowed (*y*); in other cases, it has been refused (*z*).

In a recent case, the plaintiff in a cross bill, which had become useless as a discovery bill, by the hearing of the original suit, added a prayer for relief after the defendant had taken an office copy, but before he had put in an answer; and the amendment was allowed under the special circumstances (*a*).

Upon motion to strike out the prayer for relief, and convert the bill into a bill of discovery merely, it has been held that the proper course is to file a new bill, dismissing the former (*b*); and the orders which have been made for amendment seem to have been either upon consent (*c*), or at the expense of indemnifying the defendant for the costs of the proceeding (*d*). The doctrine on this subject in the time of Lord Hardwicke (*e*) has been deemed inapplicable at the present day (*f*).

(*y*) *Lousada* v. *Templer*, 2 Russ. 564; *Crow* v. *Tyrrell*, 2 Madd. 409, a case of mutual amendment. *Lewthern* v. *Whorwood*, Bunb. 129.

(*z*) *Butterworth* v. *Bailey*, 15 Ves. 358; *Jackson* v. *Strong*, 13 Pri. 494; 1 Y. & J. 577.

(*a*) *Severn* v. *Fletcher*, 5 Sim. 457.

(*b*) *Cholmondeley* v. *Clinton*, 2 V. & B. 113; 2 Mer. 71; *Frietas* v. *Dos Santos*, 1 Y. & J. 577; *King* v. *Rosset*, 2 Y. & J. 36; 1 Younge, 200.

(*c*) *Gurish* v. *Donovan*, 2 Atk. 166; S. C. 2 Ves. & B. 114; *Coventry* v. *Burslem*, 2 Anst. 567. But see *Angell* v. *Westcombe*, 6 Sim. 31.

(*d*) *Gordon* v. *Simpkinson*, 11 Ves. 510; 1 Sch. & Lef. 317. *E. I. Comp.* v. *Herbert*, cited 3 Ves. 347; 12 Pri. 534, 536.

(*e*) *Hildyard* v. *Cressy*, 3 Atk. 303; *Rose* v. *Gannel*, 3 Atk. 439; *Leman* v. *Alie*, Ambl. 162.

(*f*) 2 Ves. & B. 115.

CHAPTER II.

OF ANSWERS WHICH MAY BE REQUIRED TO ACCOMPANY OR SUPPORT PLEAS.

SECTION 1.

Of the Nature and Purpose of an Answer accompanying a Plea.

THERE are few points relating to discovery more important than that which involves the consideration of those cases where a defendant, though he is able to meet the bill by a plea which shews a perfect defence against the claim of the plaintiff, is yet compelled to accompany his plea by an answer to some of the charges exhibited as the foundation of the suit. It has been observed, that in an answer the plea and evidence are combined. In the cases now to be considered, the discovery and the defence are seen distinguished. The answer is here no part of the defence. It is nothing more than the plaintiff has a right to require as evidence for the purpose of trying the validity and truth of the plea (*a*).

This reasoning has been questioned. If, it is

(*a*) Ld. Red. Tr. 244, n. (*f*).

said, the answer be no part of the defence, it would seem to follow that it might be omitted; yet the defence, or, in other terms, the plea, would be bad without it (*b*). To this it may be said, that the partial answer here considered is not called for or intended as a defence to the party making it. It is insisted upon as a disclosure to which the plaintiff is entitled. Though the answer of the defendant be to some extent a protection (*c*), yet it is not evidence for him, but for the plaintiff; and it is the province of the court to judge of its effect. So far as concerns the plea, the utmost service which the answer can render to the defendant is negative: the most favorable result for him is, that it has not disproved his plea. The answer may happen to state the same facts which are averred in the plea, or facts leading to the same conclusion; but to term it a part of the defence, or a support to the plea, is neither to express its origin or purpose, but merely to describe a property which is entirely accidental.

Section 2.

Of the Cases in which an Accompanying Answer is Necessary or Proper.

There are three questions raised upon a plea—the form, the substance, and the truth (*d*). To the

(*b*) Beam. El. Pl. 34, 174.
(*c*) See 6 Ves. 39.
(*d*) Ld. Red. Tr. 301, 302. See the argument in *Corporation of Trinity House* v. *Burge*, 2 Sim. & St. 411.

first of these it is here unnecessary to advert. It is obvious that the plaintiff may in his bill charge such circumstances as would render the plea insufficient in substance, even admitting it to be true in fact. Or, he may state circumstances which are directly opposite to the matter pleaded in point of fact, admitting it to be substantially valid if it were true. Or, he might allege circumstances which would shew the matter of the plea to be both an invalid defence in substance and false in point of fact (*e*).

In the first case suggested, the court may be called upon to determine if the plea be a substantial defence to the claim of the plaintiff, and the answer is the only evidence which can be given on the argument of the plea (*f*). In the second case, the merits of the defence may be tried upon a replication. If the defendant has pleaded an affirmative fact, the truth of which it rests upon himself to prove, the plaintiff is entitled to an answer to every fact which he has charged that would be evidence against the plea (*g*). If, on the contrary, he has pleaded a fact which throws the burden of proof upon the plaintiff, the latter may then, upon the same principle, demand a discovery of every circumstance calculated

(*e*) In this case there may be difficulty in supporting the plea on the question of form. *Chamberlain* v. *Agar*, 2 Ves. & B. 259; *Whitbread* v. *Brockhurst*, 1 Bro. C. C. 404; Ld. Red. Tr. 268; Beames, El. Pl. 172, et seq.

(*f*) Ld. Red. Tr. 244, 303.

(*g*) *Harland* v. *Emerson*, 2 Cl. & Fin. Pl. 10; S. C. 8 Bligh, 62.

to assist him in that proof (*h*). The different position in which the plaintiff is placed, in the latter case, seems to have occasioned the doubts concerning negative pleas, which for a short time involved the subject in much perplexity (*i*). In these stages of the cause the discovery is the same in either case. It is limited to matters which would be evidence at the trial of the plea. If the plea be disproved, or fails to be established by the evidence produced, it is opened at the hearing (*k*), and the plaintiff will not lose the benefit of the discovery, with respect to the other facts which it covered, but the defendant will be ordered to be examined upon interrogatories to supply the defect (*l*).

It is true that the defendant, in the case which has been supposed, has denied generally, by averments in his plea, the allegations of the bill. "But," observes Sir J. Leach, V. C., in a case in which he clearly lays down the principle, "the discovery which a court of equity gives is not the mere oath of the party to a general fact, but an answer upon oath to every collateral circumstance charged as evidence of the general fact. When the defendant, therefore, pleads the general fact as a bar to

(*h*) 2 Myl. & K. 734; 6 Madd. 61; *James* v. *Sadgrove*, 1 Sim. & St. 6.

(*i*) *Newman* v. *Wallis*, 2 Bro. C. C. 143; *Hall* v. *Hoyes*, 3 Bro. C. C. 483; *Gun* v. *Prior*, 1785; 1 Cox, 197; Forrest, Ex. 88, n.; Dick. 657, cited 2 Bro. C. C. 145; 11 Ves. 291; 2 Cl. & Fin. 17, S. C.

(*k*) Ld. Red. Tr. 241, 245, 277.

(*l*) 2 Ves. 247; Ld. Red. Tr. 302.

the whole discovery as well as relief, either the plaintiff in the particular case must lose the equitable privilege of discovery as to the circumstances which he has charged as evidence of the fact, or some special rule must be adopted by analogy, in order to preserve to him that privilege.

"If a plaintiff comes into equity to avoid a legal bar upon the ground of some alleged equitable circumstances, as in the case of a release, the defendant is not permitted to avail himself of his legal defence, so as to exclude the plaintiff from a discovery as to the alleged equitable circumstances. He may, indeed, plead his release; but he must in his plea generally deny the equity charged in the bill, and must also accompany his plea with a distinct answer and discovery as to every equitable circumstance alleged. In such a case the issue tendered by his plea is, not the fact of his release, for that fact is admitted by the bill, but the issue is upon the equitable matter charged. Yet, inasmuch as the principles of a court of equity entitle the plaintiff to a discovery from the defendant upon the matter in issue, here we find that, notwithstanding the defendant pledges his oath that there is no truth in the equitable matter charged, he is nevertheless compelled to accompany his plea by an answer and discovery as to every circumstance alleged as evidence of the equity (*m*)."

(*m*) Per Sir J. Leach, V. C., *Thring* v. *Edgar*, 2 Sim. & St. *Sanders* v. *King*, 6 Madd. 61; 279.

If, admitting all the circumstances stated in the bill to be true, the fact insisted upon in the plea is a valid defence to the case made out by the plaintiff, an accompanying answer is unnecessary and improper (*n*).

The plaintiff may possibly introduce the fact which would constitute a bar in the form of a pretence, and barely deny it, without stating any circumstances to disprove it. The defendant may then plead the fact; and upon principle it would seem that there can be no need of any other answer than the averment in the plea, where the charge consists in a naked denial.

It is said (*o*), that the defendant may support his plea by an answer, *in subsidium*, touching any thing not charged by the bill. This, if it can in any sense be termed an answer, is clearly a part of the defence; though as such it is not easy to suggest an object which it can serve in the present state of pleading. It is not necessary, however, to consider it here, for it is in no respect of the nature of discovery.

The cases in which an answer is necessary, may, for their convenient discussion, be divided into two classes.—1st. Where the plaintiff in his bill admits the existence of a legal bar, and charges some equitable circumstances to avoid its effect; and, 2nd. Where the plaintiff does not admit the existence of

(*n*) *Thring* v. *Edgar*, 2 Sim. & St. 274; *Pennington* v. *Beechy*, 2 Sim. & St. 282.

(*o*) Gilb. For. Rom. 58, 59; Ld. Red. Tr. 299. And see Beames, El. Pl. 37.

any legal bar, but states some circumstances which may be true, and to which there may be a valid ground of plea, together with other circumstances which are inconsistent with the substantial validity of the plea.

It is observable that the only difference in these classes is, that in one of them the matter of the plea is admitted in the bill; in the other, it is first shewn by the defence. The effect of this difference is considerable in defining the extent of the discovery which the defendant is bound to render, notwithstanding his plea. The frequent arguments which arise upon the points now under discussion are not so much the result of any doubt respecting the principle by which the cases should be governed, as they are a consequence of the uncertainty in its application. The distinction here drawn will permit of separating the cases where the limits to which the plea and answer respectively extend are plainly marked, and create no difficulty, from others, in which those limits are to be defined by a more inconclusive process, and which are therefore the chief sources of controversy.

Section 3.

Of the Discovery where the Ground of Plea is Admitted in the Bill.

The first class of cases in the division which has been suggested is where the matter of the plea in

bar is expressly admitted in the bill, accompanied however by a charge of some equitable circumstances to avoid its effect. These cases are the lowest in the scale of difficulty. This is caused by the simplicity of the issue. One important question is wholly withdrawn. The truth of the plea is not disputed. The circumstances which are charged in the bill, to avoid the matter of the plea, plainly constitute the measure of discovery which must be given by answer.

Instances falling under this head are numerous. Of these may be mentioned the case of a bill brought to impeach a decree on the ground of fraud used in obtaining it (*p*); to avoid the effect of a judgment by a court of ordinary jurisdiction (*q*); to set aside a release (*r*), or an award (*s*); or to open a stated account (*t*).

In all these cases, and in others which may fall under the same principle, the bill having admitted the existence of a fact which, taken alone, would be conclusive against the plaintiff; and then having

(*p*) Ld. Red. Tr. 239, et seq.; 6 Ves. 596.

(*q*) Ld. Red. Tr. 253, 256; *Parkinson* v. *Lecras*, cited Id.; *Rawlins* v. *Rawlins*, 3 Rep. in Cha. 30; *Pierce* v. *Johns*, Bunb. 11.

(*r*) Ld. Red. Tr. 261; 6 Madd. 64; 2 Sim. & St. 279; *Walter* v. *Glenville*, 5 Bro. P. C. 555; *Parker* v. *Alcock*, 1 Y. & J. 432; *Roche* v. *Morgell*, 2 Sch. & Lef. 721; *Freeland* v. *Johnson*, 1 Ans. 276.

(*s*) Ld. Red. Tr. 261; 2 Ves. & B. 364; 6 Ves. 596; *Allards* v. *Campbell*, Bunb. 265; *Rybolt* v. *Barrell*, 2 Eden, 131; *Gartside* v. *Gartside*, 3 Anst. 735. As to *Pope* v. *Bish*, and *Edmundson* v. *Hartley*, 1 Anst. 59, 97, see 6 Ves. 595.

(*t*) Ld. Red. Tr. 259; 6 Ves. 596.

proceeded to state specific grounds upon which that fact, though formally or ostensibly in existence, yet ought not to have the effect of concluding the plaintiff, which in ordinary circumstances it would have—the defendant can readily decide to what he may plead and to what he must answer. The bill is an express guide. The plaintiff has pointed out the particular circumstances upon which he relies to overcome the anticipated bar. With regard to these, the principles of equity require a discovery.

There are cases approaching very closely to these, where the matter of the plea is not expressly but tacitly admitted in the bill. The statute for limitation of actions may be pleaded (*u*) to a bill which states that the cause of action accrued more than six years previously, adding, that within six years a transaction has taken place raising a new assumpsit (*v*). In such a case, prior to the adoption of the rule discussed in the preceding chapter (*w*), the plea was admitted to the claim of the debt, but not to the discovery when the debt became due (*x*). The plaintiff can now obtain the benefit of that rule only by very special allegations (*y*); and the discovery is plainly confined to the circumstances charged, which would take the case out of the statute. The statute

(*u*) Ld. Red. Tr. 269; *Latchwell* v. *Foster*, Rep. t. Fin. 266.

(*v*) *Bayley* v. *Adams*, 6 Ves. 598.

(*w*) Chap. I. Sect. 4, p. 11.

(*x*) *Mackworth* v. *Clifton*, 2 Atk. 51; 2 Sch. & Lef. 635. See Ld. Red. Tr. 270.

(*y*) *Sutton* v. *E. of Scarbro'*, 9 Ves. 75.

of frauds may be pleaded, and the same principle applies with regard to an accompanying answer (*z*).

Section 4.

Of the Discovery where the Ground of Plea is not Admitted in the Bill.

Within this class will be found the cases which have been mainly the subject of discussion. If no ostensible bar be in the bill admitted to exist, and yet the defendant would plead in bar of the discovery, he must distinguish those facts which, if true, would not invalidate or disprove his plea, and plead to the discovery sought with regard to them; and then answer to the facts which, if true, would disprove or invalidate his plea, and to the matters which are specially alleged as evidence of such facts.

This proposition may be illustrated by many cases. To a bill by plaintiff claiming under a devise of real estate, the defendant put in a plea founded upon the stat. 32 Hen. 8, c. 2, and the court held the plea to be good in substance; but that, inasmuch as the bill specifically charged that within sixty years the ancestor of the defendant entered upon the premises in question, and occupied them as tenant

(*z*) Ld. Red. Tr. 265, et seq.; Ves. 182; *Evans* v. *Harris*, 2 V. & B. 361.
Spurrier v. *Fitzgerald*, 6 Ves. 555; *Morrison* v. *Turnour*, 18

to those under whom the plaintiff claimed, it was defective without an answer to these facts (*a*). To a bill for an account of the dealings and transactions of a partnership, the plea that the defendant is not a partner, must be accompanied by an answer and discovery as to the circumstances specially charged as evidence of the partnership (*b*). In a creditor's suit, a plea of no debt is a full bar, except in so far as any discovery is distinctly sought of circumstances as evidence of the existence of the alleged debt (*c*). Where the defendant pleads a purchase for a valuable consideration without notice of a defective title, and is required to accompany his plea by an answer, the extent to which he must answer is governed by the same principle (*d*). In the greater number of these cases there would probably be little question either as to the necessity or the extent of the discovery.

Until the rule in *Thring* v. *Edgar* (*e*), it might have been often a matter of doubt whether the tendency of particular facts as evidence to establish the case of the plaintiff, was sufficiently direct to require an answer. In a case before Lord Eldon upon a bill for an account, charging an agreement, and that

(*a*) *Crow* v. *Tyrrell*, 2 Madd. 409.

(*b*) *Sanders* v. *King*, 6 Madd. 61; *Yorke* v. *Fry*, 6 Madd. 65; *Drew* v. *Drew*, 2 V. & B. 162. See *Jacobs* v. *Goodman*, 3 Bro. C. C. 488, where a plea would now be necessary.

(*c*) *Thring* v. *Edgar*, 2 Sim. & St. 274.

(*d*) *Pennington* v. *Beechy*, 2 Sim. & St. 282; 14 Ves. 66; 5 Sim. 650.

(*e*) 2 Sim. & St. 281.

the accounts had been actually kept, it was held that the latter circumstance would have been evidence before a jury of the agreement stated in the bill, and therefore it was not sufficient for the defendant merely to deny the agreement having been entered into, without a negation of that particular circumstance (*f*). Where the question turned upon the fact of a partnership having existed, it was objected to the plea that it should have been accompanied by an answer to the charge that the party had been an apprentice, as that fact might afford some evidence from the probability that he would be taken into partnership; but it was held not to be necessary to answer every circumstance tending to the point upon which the defendant relies in his plea (*g*).

Section 5.

Of the Rule that the Answer is Proper only to Special Charges.

It would seem that an allegation or charge may be specific in two points of view. It may be specific with regard to the particular fact which the evidence generally charged to be in the possession of the defendant will, it is asserted, prove. And it may be specific in pointing to particular circum-

(*f*) *Jones* v. *Davis*, 16 Ves. 265; *Arnold* v. *Heaford*, 1 B. M'Clel. & Y. 330.

(*g*) *Drew* v. *Drew*, 2 Ves. & 162.

stances, to prove the general fact upon which the title is founded.

Where the bill neither charges a special fact inconsistent with the plea itself, negativing that plea as it were by anticipation (*h*), alleging generally that the defendant holds papers and writings by which the truth of the said matters would appear; nor charges specially that the defendant holds a particular deed or paper, or is acquainted with a particular fact, by which if produced or confessed the general title which he asserts would be proved—he has charged nothing which is specific in either point of view, and an accompanying answer, in such a case, is unnecessary, and would overrule his plea (*i*).

The first kind of special charge which has been adverted to as requiring an answer, may be illustrated by the case where the plaintiff alleges that the defendant has in his possession deeds and papers which would prove, not merely the general title which the bill sets out, but which would prove particular facts, that contribute to establish that title. Thus, where the plea was founded upon an alleged adverse possession for a long period, and there was an allegation in the bill, that during that period a party from whom the defendant claimed had occupied the premises under the trusts of a

(*h*) 2 Myl. & K. 744.

(*i*) *Thring* v. *Edgar*, 2 Sim. & St. 274; *Pennington* v. *Beechy*, Id. 282; *M'Gregor* v. *E. I. Comp.*, 2 Sim. 454; *Tarlton* v. *Hornby*, 1 Y. & Coll. 172; *Armitage* v. *Wadsworth*, 1 Madd. 196; 2 Myl. & K. 743.

term, it was sufficient to subjoin this fact to the general charge that the defendant had in his possession certain deeds, documents, and writings shewing the truth of the matters stated; and the plea, unsupported by an answer to that charge, was held to be bad (*k*). The question is thus put by the lord chancellor in a recent decision:—"Is the case made by the bill in the particular charge one which would be capable of proof or illustration by the disclosure of facts of which a discovery is sought by the bill? It is argued on general principles that a discovery ought not to be compelled, if, on proof of the matter of the plea, it will appear that the plaintiff has no title. But if the title would in part be proved by the discovery of the fact charged, does not that raise a distinct case and form a ground of exception? Can a defendant to such a bill suppress or evade the discovery by a simple denial of the title generally (*l*)?"

In the second point of view, the charge is also specific, if, after stating the general fact, it formally alleges, as evidence of that fact, that certain circumstances occurred, which the defendant ought to confess. In this case it was laid down by Sir John Leach, V. C., that, in order that a defendant may "know what is the particular discovery which the plaintiff requires from him, it is incumbent upon the plaintiff distinctly to state it in the bill; and the

(*k*) *Hardman* v. *Ellames*, 5 Sim. 647, 650; 2 Myl. & K. 742.

(*l*) *Harland* v. *Emerson*, 8 Bligh, P. C. New S. 86; S. C. 2 Cl. & Fin. P. C. 10.

common form of doing this is, by the plaintiff charging, as evidence of his title, the particular matters as to which he seeks a discovery from the defendant. Unless the defendant is distinctly informed by the plaintiff what are the particular matters affecting his title, as to which he seeks such discovery, the defendant, not knowing what he is expected to answer, is not to answer at all (*m*)."

The form of expression here pointed out, it would seem, must be confined to these cases, where the defendant charges a particular circumstance in support of his title; it can scarcely, in any propriety of language, apply where the bill, having averred the specific facts upon which the title is founded, charges, in the common form, applying to books and papers, that by them the truth of "the several matters aforesaid, or some of them, would appear;" and merely adding to that general charge that a certain fact in particular would thereby be proved. For example, if the bill insisted upon a certain agreement, and *as evidence thereof* charged that the defendant had done some act manifesting his sense of the existence of the agreement, the words in question may be aptly used as indicating the matter to be discovered in the event of the defendant's pleading to the general fact. But if the plaintiff states his case, as he may do, without alleging any collateral matter as evidence of it, he may still entitle

(*m*) *Thring* v. *Edgar*, 2 Sim. & 2 Sim. & St. 283; *Evans* v. St. 281; *Pennington* v. *Beechy*, *Harris*, 2 Ves. & B. 361.

himself to an answer, notwithstanding the plea, if he adds to the usual charge that the defendant holds papers and writings from which the truth of the several matters would appear, an allegation that thereby in particular some circumstance which he specifies, inconsistent with the anticipated plea, would appear. The formal words adverted to are then inappropriate. The object of the charge is to compel an admission, upon which the plaintiff might require the papers to be produced. The papers may constitute evidence favourable to the plaintiff: the mere *possession* of them of itself proves nothing.

PART II.

CHAPTER I.

OF DEFENCE TO DISCOVERY ON THE GROUND THAT THE PLAINTIFF HAS NO INTEREST IN THE SUBJECT.

SECTION 1.

Of this Defence to Bills praying Relief.

LORD REDESDALE observes, that "interest in the subject of the suit, or a right to the thing demanded, and a proper title to institute a suit concerning it, are essentially necessary to sustain a bill (*a*)." This proposition merely asserts that a bill cannot be sustained in equity, if it can be made to appear to the court that the plaintiff is without a shadow of title to the subject in question. The circumstance that the case offers a proper question for the decision of a court, excludes the possibility that the title of the plaintiff should be indisputable. This principle is made the subject of a particular section of the treatise on pleading, for the purpose of intro-

(*a*) Ld. Red. Tr. 154, 231.

ducing examples of the ground of defence, which, when it is taken by demurrer, assumes that the facts stated in the bill do not amount to a title in the plaintiff, and when it is taken by plea, asserts some fact which is conclusive against the existence of such a title. It is obvious that an examination of the interest which is in all cases sufficient to sustain a bill, involves a very extensive inquiry, into which it is not necessary to the present object to enter. Where the plaintiff shews, or attempts to shew, an equitable title, and thereupon prays relief, if the defendant can protect himself by a demurrer which is good to the relief, it has been seen that it extends also to the discovery (*b*). If the defendant is enabled to meet the case by a plea to the relief, the rule is the same (*c*); though it may happen that the defendant must accompany or support his plea by an answer, the extent of which has been already considered (*d*). The cases which are to be considered in this chapter are therefore reduced to those in which the bill prays a discovery only, in aid of the trial of some other suit or action.

It may be observed, that the present ground of objection necessarily extends to the entire bill or subject of suit (*e*). The same remark will be found to apply to all the heads of defence to discovery which compose this second part.

(*b*) Chap. I. Sect. 3, p. 6.
(*c*) Id. Sect. 4, p. 11.
(*d*) Chap. II. p. 25.
(*e*) *Blacket* v. *Langlands*, 1 Anst. 14.

Section 2.

Of this Defence to a Bill of Discovery by Demurrer.

The most simple case is, where it is apparent upon the face of the bill that the action or suit which the plaintiff projects or has instituted cannot be sustained. The defence is then by demurrer. The case is thereby reduced to a mere question of law, to determine which no discovery is needed. The averment of title in the bill is not of a fact, but of the consequence of facts (*f*); and although the plaintiff should allege by his bill that he intends to commence, or has commenced, an action in a court of common law, yet if the court of equity, which must be taken to know the law (*g*), be of opinion that the facts stated by the bill are not such as will support an action, a demurrer will be allowed; for unless the plaintiff has a title to recover in an action at law, supposing his case to be true, he has no title to the assistance of a court of equity to obtain from the confession of the defendant evidence of the truth of the case (*h*). The possibility of acquiring a title

(*f*) Ld. Red. Tr. 233.

(*g*) *Mayor &c. of London* v. *Levy*, 8 Ves. 404.

(*h*) Ld. Red. Tr. 187; *Blondell* v. *Pannett*, Rep. t. Finch, 88; *Newman* v. *Holder*, Id. 44; *Ramere* v. *Rawlins*, Id. 36; *Debigge* v. *Lord Howe*, in Cha. Hil. 1782, cited 3 Bro. C. C. 155; *Lord Kensington* v. *Mansell*, 13 Ves. 254; *Wallis* v. *D. of Portland*, 3 Ves. 502; *Cuthbert* v. *Creasy*, 4 Bligh, P. C. 125; *Coke* v. *Bishop*, 8 Vin. Ab. 537, pl. 5; 4 Sim. 179; Cooper, Tr. Pl. 194.

will not be sufficient; the plaintiff must be able to allege that he has done every act necessary to perfect his interest (*i*).

If the case of the plaintiff be founded upon a deed, the effect of which the bill purports to state, but alleges that the deed is in the possession or power of the defendant, and that the plaintiff is therefore unable to set it forth with certainty, the court will not conclude the plaintiff by that statement; for he admits that it may be inaccurate. If the defendant would call upon the court at once to determine the true construction of the deed, he is, from the frame of the bill, put to the necessity of pleading it (*k*).

It may be observed, however, that if it be merely doubtful whether an action will lie upon the case stated, it would seem that the plaintiff will not be denied the benefit of a discovery (*l*). Lord Thurlow held, that if it be "a measuring cast, and upon cases at law which must stand till they are revised by a court of law," he would not, sitting in equity, say that the cases were improperly settled at law (*m*). Where a discovery is sought in aid of a

(*i*) Ld. Red. Tr. 126, 155, 187; *Angell* v. *Draper*, 1 Vern. 399; *Tourton* v. *Flower*, 3 P. Wms. 369; *Shirley* v. *Watts*, 3 Atk. 200. See *Taylor* v. *Hill*, 1 Eq. Ca. Ab. 132, pl. 15.

(*k*) *Wright* v. *Plumtree*, 3 Madd. 481.

(*l*) *Mant* v. *Scott*, 3 Price, 490, et seq.; *Cowan* v. *Phillips*, 3 Ans. 849; 1 Bligh, N. S. 295.

(*m*) *Rondeau* v. *Wyatt*, 3 Bro. C. C. 154.

defence, it is presumed that the pendency of the action would always preclude objection on the ground of a want of interest (*n*).

It is common in bills of discovery to introduce the averment that the action cannot be maintained without the discovery prayed. In one case a plea was considered ill on the ground of this averment (*o*), and as a demurrer admits the case stated in the bill, it must be governed by the same principle. It is apprehended, however, that this averment could not vitiate a demurrer or plea which would be otherwise good on the present ground of objection (*p*).

It has been argued that a bill for a discovery may be maintained if the facts alleged are facts tending to support, if they do not entirely support, the title upon which the plaintiff insists; for he may have it in his power to produce other evidence in support of his case, and the discovery sought may form a link only in the chain (*q*). It is not, however, enough that the alleged action might be supported by a confession or proof of the allegations on the record, added to other evidence; but the question is, whether it could be sustained if those allegations were confessed or proved, and no other evidence adduced. A demurrer is good if full proof, by an-

(*n*) *Bp. of London* v. *Fytche*, 1 Bro. C. C. 96; *Doble* v. *Potman*, 1 Ea. & Y. 429. But see *Martin* v. *Nicolls*, 3 Sim. 458.

(*o*) *Robertson* v. *Lubbock*, 4 Sim. 180.

(*p*) See *Mayor and Commonalty of London* v. *Levy*, 8 Ves. 399, 404.

(*q*) 4 Sim. 177.

swer or otherwise, of the facts stated by the bill, would be insufficient to sustain the action. It is therefore incumbent upon a plaintiff to a bill of discovery, to unfold by his bill so much of the case upon which he relies as will preclude objection to his title.

Section 3.

Of this Defence to a Bill of Discovery by Plea.

"If," Lord Redesdale observes, "a plaintiff by his bill states himself to have an interest which entitles him to call on the defendant for a discovery, though in truth he has no such interest, the defendant may by plea protect himself from making the discovery, which may involve him in difficulty and expense, and perhaps may be prejudicial to him in other cases. Thus, if a plaintiff states himself to be heir, or administrator, of a person dead intestate, and in that character seeks a discovery from a person in possession of property which belonged to the deceased, of his title thereto, or of the particulars of which it consists, the defendant may plead that another person is heir or personal representative, or that the person alleged to be dead is living (*r*)." If a plea of

(*r*) Ld. Red. Tr. 283, cites *Ord* v. *Williamson*, 1773. See *Ord* v. *Wilkinson*, Forrest, Ex. R. 90, n.; *Ord* v. *Huddleston*, Dick. 510. In Ld. Red. Tr. 230, this plea is classed with pleas "that the plaintiff is not the person he pretends to be, or does not sustain the character he assumes, and there-

this kind were not good, "any person," it was said by Sir John Leach, "first suing out a writ at law against another, might, by a bill in equity for a discovery, compel such other person to disclose upon oath all the particulars of any transactions, however secret and important, with which the plaintiff had no manner of concern, merely by introducing into his bill the false allegation that he had an interest in the transaction; since it would not be permitted to the defendant to protect himself from such discovery by proving to the court the falsehood of that allegation (*s*)." And it has been justly remarked, that, whether the want of interest appear on the bill or be brought forward by the plea, cannot be material in any other view than as deciding whether the defect must be taken advantage of by demurrer or by plea (*t*).

Section 4.

Of Pleas purely Legal.

It has been contended that to a discovery in aid of a legal title, there cannot be a plea of no legal title, for that is the very question to be tried at

fore is not entitled to sue." And see cases cited id. et seq. *Cholmondeley* v. *Clinton*, 2 Mer. 71. Plea to a bill of discovery in aid of an ejectment, shewing that the legal estate was in other persons than the plaintiff. See 2 Ves. jun. 515.

(*s*) *Mendizabel* v. *Machado*, 1 Sim. 77. And see Ld. Red. Tr. 230, et seq.

(*t*) Beames, El. Pl. 276.

law (*u*). The authority on which reliance has been chiefly placed is the case of *Hindman* v. *Taylor* (*v*). The report of the pleadings, it is said, cannot be depended upon (*w*); but the case appears to have been substantially this:—In consideration of the defendant being appointed to the command of a ship, he had contracted to pay the plaintiff a sum of money, part of which only was paid, owing to a new agreement having been made, and the names of the parties taken off the original contract: it was insisted that this amounted to a release at law, and that the defendant was therefore not bound to answer the bill. Lord Thurlow overruled the plea. "The reason," he observes, "for permitting a plea in bar to the relief, is to prevent the going into the whole cause, by that which, if it stood *per se*, would put an end to it; but where the bill is for discovery, the cause ends with the answer. Then the whole remedy being, upon the face of the transaction, at law, the question is, whether you shall by the plea bring the whole merits on here. If he had prayed relief, it would have been demurrable; and now you say he shall not have a discovery because his relief is at law. This is a case where he has no election, he must sue at law. The dry question is this, whether there is any objection in natural justice to a defendant giving a discovery, in order to found a

(*u*) See *Gait* v. *Osbaldeston*, 5 Madd. 428; reversed 1 Russ. 158.

(*v*) 2 Bro. C. C. 7; 2 Dick. 651. See Beames, El. Pl. 277.

(*w*) 4 Sim. 172.

relief at law. Where the bill is for relief, the discovery is merely ancillary to the relief; therefore, if the defendant can shew, without going further, there is one point which will bar the relief, the court will first look into that point. The court there takes the plea as the first method of getting at that justice which the subject has a right to obtain. Where the remedy is legal, to let the defendant refuse the discovery is putting matters out of their train; for the court can ultimately do nothing as to the remedy. If the bill be for equitable relief, and the plea be overruled, the defendant has this objection, that the court has put him to a great expense in going through a cause where he had brought it to a point which ought to have decided it in his favor. In the same case, if the remedy is at law, he has only to complain that he has been put to the expense and trouble of putting in a longer answer. As to the expense of the copy and answer, that the court exempts him from; for the moment the answer comes in, he must be paid all the expense he has been at; and, as to the trouble, the court cannot relieve him from that:" therefore, "I think myself founded in declaring, that, where the bill is for discovery leading to relief at law, the defendant cannot plead in bar here to the discovery, what will be a bar to the relief there."

It must have been assumed, in support of the plea in this case, that it was sufficient, in all circumstances, to meet a bill for a discovery in equity by the same plea upon which issue was taken at law. The pro-

position was simply, that inasmuch as the pleadings at law necessarily led to a certain issue, and the plaintiff brought his bill in equity for the purpose of obtaining evidence on the trial of that issue, the court of equity would give no discovery until the plaintiff had established his case by disproving the plea, being the very object in aid of which the discovery was sought. The inevitable result of such a principle must be the abolition of this branch of equity jurisdiction; for every bill would, as a matter of course, be met by the legal plea, which the plaintiff would be compelled to try in equity, before he obtained an answer.

There is an old case which will serve to illustrate this proposition. The bill sought a discovery to prove trover and conversion. The defendant answered, *not guilty*. Here was a perfect legal plea; but to admit it in bar of the discovery, would clearly negative the jurisdiction (*x*). On the other hand, it is submitted, that the principle of Lord Thurlow affords no authority for the proposition that the legal bar cannot be pleaded in equity to the discovery of any matters not in issue at law. In the case of *Hindman* v. *Taylor*, it would have been scarcely possible

(*x*) *Marten* v. *Hampton*, Choyce Ca. Cha. 123. See 1 Sim. 78, per Sir J. Leach; 2 Sim. 456; 4 Sim. 172, where it is said, that in the course of the argument in the case of *Mendizabel* v. *Machado*, on appeal, before Lord Lyndhurst, some inquiry was made with respect to the case of *Hindman* v. *Taylor*, and his lordship's impression was, that it was displaced as an authority for the proposition, which, according to the Report, it appeared to establish.

for the court to decide that none of the facts alleged in the bill, if they had been confessed by the defendant, could have afforded the plaintiff material evidence on the trial of the issue which the plea must raise.

The bill may aver that an action has been brought, or it may state facts of which the necessary effect in law appears to be, that the plaintiff has a right to bring an action; and in either case he is entitled to a discovery to aid that action so alleged to be brought, or which he appears to have a right and an intention to bring (*y*).

If the bill in equity state that the plaintiff has commenced an action, and the defendant has pleaded a certain plea, and the discovery is sought of facts which would disprove that plea if they were discovered, or of circumstances charged as evidence of such facts, there is nothing to prevent the defendant from pleading the same plea which he has put in at law, subject to the principle which has been stated elsewhere with regard to the necessity of an answer as to any matters charged which would be evidence at law to disprove the plea (*z*). The matter

(*y*) *Mayor and Commonalty of London* v. *Levy*, 8 Ves. 404. For bills before actions brought, see *Moodalay* v. *Morton*, 1 Bro. C. C. 471; *E. I. Comp.* v. *Evans*, 1 Vern. 307, and cases cited. *Marsden* v. *Panshall*, 1 Vern. 407; 7 Ves. 291; *Heathcote* v. *Fleet*, 2 Vern. 442; *Morse* v. *Buckworth*, Id. 443; *Creswell* v. *Luther*, Cary, 82. Where the ancient exercise of the jurisdiction in some cases is doubted. Cary, Rep. 22; *Stapleton* v. *Sherrard*, 1 Vern. 212; *Sherborne* v. *Clerk*, Id. 273; *Lowthal* v. *Jenkins*, Barnard. Ch. R. 39.

(*z*) Part I. Chap. II. p. 25.

of the plea is in such cases stated by the bill, and the measure of discovery is evident, and has been exemplified in the chapter referred to (*a*). The only difference in the present cases is, that regard must be had to the legal issue. The plea in equity raises no question for trial there, and may be even without the averments necessary to an issue (*b*).

Where the action has been brought, and it appears upon the bill and plea in equity that some certain issue has been taken at law, the plea in equity constitutes a good defence to the discovery of any matters which from the form of the issue at law are admitted there, and of which no proof is therefore required. If the question to be tried at law involve the entire merits of the case, equity will give a discovery of every particular which would afford evidence to support the case of the plaintiff in the bill. Accordingly, where a plea of the statute of limitations to a bill of discovery in aid of an action of assumpsit stated that the defendant had pleaded several pleas to the action, and amongst others the general issue, it was held by Sir John Leach, V. C., that the plea was bad, as it did not appear upon the record that the defendant had pleaded any plea to the action which would preclude the plaintiff from going into the merits of his case, and availing himself of the discovery sought by the bill (*c*).

(*a*) Part I. Chap. II. Sect. 3, 331.

(*b*) *Cork* v. *Wilcock*, 5 Madd. p. 31.

(*c*) *M'Gregor* v. *E. I. Company*, 2 Sim. 453.

In the other case which has been suggested, where the bill is brought before any action has been commenced, upon a state of facts which shew a legal right, there may be some additional difficulty in sustaining a plea. This difficulty simply results from the circumstance that the subject is not brought to so definite a point. It cannot perhaps with certainty be collected from the record what questions might arise on the trial which is contemplated, or what questions may be excluded. Instead, therefore, of merely insisting that the evidence sought cannot be necessary upon a certain issue raised between the parties, it would seem that the defendant must be prepared to contend that it cannot be necessary upon any issue which can possibly arise out of the facts stated.

Assuming the plea to be good in law, and to be that which is in fact relied upon there; and that no charge appears in the bill of any matter which would be evidence adverse to the defendant or useful to the plaintiff upon the trial of the issue which it raises, the discovery may be refused without inconvenience. If there be any facts specially charged, which, if confessed or proved, would be evidence upon the trial of that issue, such facts must be answered (*d*).

Arguments against the admission of some mere legal bars as pleas to bills of discovery have frequently been borrowed from cases where they have

(*d*) See Part I. Chap. II. p. 25.

been held inadmissible to bills praying relief ancillary to a trial at law. Sir A. Hart, V. C., in his judgment on the plea of a fine and non-claim to a bill praying a discovery and the aid of the court to prevent the setting up of an outstanding term, said, "If the court were to take cognizance of the question whether these fines and non-claim are or are not a bar, the consequence would be, if on argument it appeared that they are vicious and no bar, that the plaintiff, on the plea being overruled, would have to go again into a court of law, and to try the question a second time. But, if the plaintiff took issue on the plea, many facts might be proved to nullify the plea. The plaintiff might be able to shew, by extrinsic matter, that the plea was good for nothing: as, for instance, by proving that there had been an entry within the five years, that the plaintiff was under age when the fines were levied, that there had been fraud in levying them, or that there were no proper tenants to the præcipe when the recoveries were suffered; and having proved all these facts in a court of equity, that court would have only to turn the plaintiff back to re-agitate all these questions in a court of law, where they must ultimately be decided (*e*)."

The distinction is, that in these cases the plea is offered as a bar to the relief; and if it were permitted to have that effect, it is assumed that the party in possession would be thereby enabled

(*e*) *Leigh* v. *Leigh*, 1 Sim. 369; *Jermy* v. *Best*, 1 Sim. 374, in arg.

to use an accidental advantage to protect his possession against a real right. This reasoning is wholly inapplicable to a bill for discovery merely. In such a case there is not any principle upon which the court can be required to intend against the defendant the existence of facts which would disprove his plea. The court is not called upon to assume that the plaintiff has any other or better case than his bill states. If, therefore, there appear upon the bill no allegations of facts which would obviate the effect of the matter pleaded, there can be no objection in principle to meeting the bill of discovery by the plea. The discovery could be of no avail if the plea be good in truth and substance. To its truth the plaintiff has objected nothing. That it is substantially good must be inferred from the fact that it has not been demurred to at law. The question is not whether the court of equity shall put the plaintiff upon proof of his case, merely to determine whether it ought to assist him in that very object,—the proof of it. A replication in equity, putting in issue the truth of the plea, would be useless (*f*), for whatever might be the result, it would not assist him in trying the same issue at law. Where the defendant to an action of assumpsit pleaded the statute of limitations, and the plaintiff brought his bill for a discovery in support of the action, but introduced no charge that any promise had been made within six years, evidenced by any writing, it was

(*f*) 15 Ves. 191, in arg.

held that the statute of limitations was a good plea in equity to the entire bill (*g*).

Where there are any allegations in the bill of matter which would avoid the effect of the plea in bar, it cannot be pretended that the plea should protect the defendant from discovery touching such matter. The extent of the discovery which a plea will in such cases cover, when the bill is for relief, has been already considered (*h*). The same principle may be seen applied to a bill of discovery only, in aid of an action upon a promissory note, to which the statute of limitations had been pleaded at law. It was charged that the defendant had admitted the debt and promised to pay the amount, and that interest on the note had been paid within six years. Here the defendant was allowed to protect himself in equity, by the statute of limitations, from a discovery as to the original constitution of the debt, and whether it had since been paid, but compelled to answer fully the rest of the bill; for the plaintiff was entitled to the discovery as evidence to be used at law, to disprove the plea of the defendant there, that he had made no promise within six years (*i*).

(*g*) *M'Gregor* v. *E. I. Comp.* 2 Sim. 452.

(*h*) Part I. Chap. II. p. 25.

(*i*) *Cork* v. *Willock*, 5 Madd. 331.

Section 5.

Of Pleas other than purely Legal.

The foregoing principles seem to be the result of the decisions upon this subject. They cannot, however, be applied to any other cases than those of purely legal pleas; for, unless the plea be precisely the same in substance as that which might be put in at law, and would be sustained against a demurrer there, it could afford no perfect indication of the nature of the issue, and no means of judging of the evidence which may be necessary. The plea, moreover, ought to shew an unquestionable defence to an action founded upon the matters alleged in the bill, and not merely rest upon the defendant's view of the result or effect of several circumstances which, when given in evidence in a court of law, may possibly be considered by the jury to have a different or contrary effect. In conformity with the view here taken of the qualities which are essential to a plea of this kind, it will be found that the principal cases in which this protection from discovery has been successfully urged, are where the statutes of limitation have been pleaded (*k*). It has been seen,

(*k*) *Jones* v. *Pengree*, 6 Ves. 580; *Bayley* v. *Adams*, 6 Ves. 593; *Baillie* v. *Sibbald*, 15 Ves. 191; *Crow* v. *Tyrrell*, 2 Madd. 409; *Cork* v. *Wilcock*, 5 Madd. 331; *M'Gregor* v. *E. I. Comp.* 2 Sim. 453: contrà, *Dean and Chapter of Westminster* v. *Cross*, Bunb. 60. See 2 Madd. 408, where it is said that this plea had been searched for without success. See *Earl of Breadalbine* v. *Caithness*, 8 Vin. Ab. 538, pl. 8; S. C. 8 Bro. P. C. 353.

that where the defence was founded upon circumstances implying a release, the plea was overruled (*l*). If the plea confesses and avoids some facts, and traverses others, it is extremely difficult to contend that it should be a bar to the discovery; for, in the trial at law, the plaintiff may require the answer as evidence to prove some of the facts which the plea in equity has admitted, and to assist him in proving the facts which it has traversed. This is exemplified in a recent decision. The defendants had received from the government of Spain, funds which they were originally directed to pay to certain creditors of that country, of whom the plaintiff was one, but the authority for such an application of the money was revoked when only a part of it had been paid. The plaintiff commenced an action in the court of Common Pleas for his share of the unappropriated sum in the hands of the defendants, and filed a bill for discovery and production of papers in aid of the trial. The defendants put in a plea, which is thus described in the judgment of the vice chancellor:—"In this case the right to discovery is founded upon a variety of circumstances, which are noticed at the end of the plea. First, it sets forth a set of facts, which have the effect of confessing and avoiding the principal matter which is alleged in the bill, namely, a certain authority from the government of Spain; secondly, it avers that there was no agreement to appropriate the monies in question;

(*l*) *Hindman* v. *Taylor*, ubi supra.

and, thirdly, that neither the plaintiff, nor any of the other holders of the bills or certificates, were privy to the agreement between the defendants and the Spanish commissioners. The plea is not single but multifarious; and, for that reason, must be overruled." "There is," he added, "a further observation which has occurred to me upon this case. I apprehend, that, if a right of action is founded upon a variety of circumstances put together, a plea which attempts to shew that the action cannot be maintained by confessing and avoiding some of the circumstances, and denying the rest, cannot be good, for the reason, that it in effect takes to pieces all the several single grounds, which put together are asserted as the grounds upon which the action is maintainable, and by confessing and avoiding some, and traversing others, it reduces the plaintiff to the necessity of proving, in a court of equity, without a discovery, that he has a right to support that action (*m*)." The objection to this course also is, that the court of equity is called upon to try the right of action upon the imperfect evidence which the plea, and the statements in the bill, which are admitted by the plea, afford, instead of leaving it to be tried in a court of law, to which tribunal it properly belongs (*n*).

It was argued, in a case before Lord Eldon, that the only pleas which could be good to bills of disco-

(*m*) *Robertson* v. *Lubbock*, 4 Sim. 161, 179.
(*n*) 4 Sim. 176, in arg.

very, were pleas collateral to the subject to be tried at law (*o*), and that the four pleas to discovery mentioned by Lord Redesdale (*p*) are all of that character. The pleas which are discussed in this chapter are however considered to fall under the second head of Lord Redesdale's arrangement, and they have been so held by the same authority from whom the argument formerly proceeded, when subsequently master of the rolls (*q*).

Section 6.

Of Pleas denying the Equitable Interest of the Plaintiff.

If the circumstances are such as may possibly confer a right of action, but the object of that action be contrary to equitable principles, a question may arise whether it will be aided in this court by compelling a discovery. This point seems to have arisen in a late case (*r*). The defendant was the holder of a sum of money alleged to be at the dispoitio n of the executive government of Spain, of which he was an agent. The plaintiff had advanced money to the Spanish government upon the security of the fund held by the defendant, upon whom he had received bills of exchange drawn by the trea-

(*o*) 15 Ves. 190.
(*p*) Tr. 282.
(*q*) 1 Sim. 77.
(*r*) *Mendizabel* v. *Machado*, 1 Sim. 68.

surer-general of Spain. An action was brought upon the bills of exchange, and a bill was filed for a discovery and commission to examine witnesses abroad in aid of the action. Amongst other facts stated, a discovery was sought of conduct and admissions by the defendant amounting to an acknowledgment of the plaintiff's title. The defendant professed to answer all the charges in the bill which sought to raise a case against him on the ground of his personal conduct and admissions; and to the rest of the discovery, and to the commission for the examination of witnesses, he pleaded various treaties and conventions between France and Spain, by which it appeared, that the funds held by the defendant had not been originally at the order and disposition of the executive government of Spain, nor had they come into the hands of the defendant to be applied by him according to the instructions of that government, but had been received for the special purpose of being applied in satisfaction of the subjects of Spain who were creditors of France, and could no otherwise be disposed of by the government of Spain than to provide for the payment of such claims when liquidated. It was held, that the plaintiff could not have the assistance of the court to enforce a contract, which could only be made in violation of the engagements under which the funds were transferred, and was contrary to the first principles of equity: that upon these principles the plaintiff had no interest in the subject; and that by the plea the defendant might protect himself from the discovery.

This decision was reversed by Lord Lyndhurst on

appeal (*s*), upon the ground, as it is said, that the facts stated shew a right of action, in which respect only he differed from Sir John Leach. The judgment of the master of the rolls does not, however, appear to proceed upon the ground that there was no right of action, but, leaving that question undiscussed, it rests on the principle, that the court would not lend its aid to the inequitable object of diverting the funds in question from the purpose for which they were assigned to the defendant and to the Spanish government. If this decision were reversed on the ground that a right of action did exist in the plaintiff under the circumstances stated, it may also be implied that, as the object of the action, being to secure an application of the funds in a manner contrary to the principles of equity, did not constitute an objection in a court of law, so neither was that a ground for withholding a discovery in equity in support of such an action. Hence it may be perhaps inferred, that, on a bill for discovery in aid of an action at law, by a plaintiff shewing a legal title, the court would not notice the equitable interests of parties entitled to the subject-matter of the action, and that in such a case, if it were desired to guard such equitable interests, it might be necessary to bring them before the court in a suit expressly instituted for their protection. This point, however, does not appear to have been expressly decided.

The case of a purchaser for a valuable consideration without notice, which is examined in another place, rests upon a different principle.

(*s*) 4 Sim. 172; *King of Spain* v. *Hullett*, cited Ib.

CHAPTER II.

OF DEFENCE TO DISCOVERY ON THE GROUND THAT THE DEFENDANT HAS NO INTEREST IN THE SUBJECT.

SECTION 1.

Of the Interest of the Defendant where the Bill prays Relief.

THE necessity which was found in the last chapter of distinguishing between the cases where the objection to answer was taken by demurrer, or offered by plea, does not occur in considering the present defence. The propriety and the effect of a plea or demurrer are to be determined by the ordinary rule of pleading. Some peculiar difficulties however belong to this ground of protection from discovery, but these will require to be examined in another place (*a*).

It is said by Lord Redesdale, that, unless a defendant has some interest in the subject, he may be examined as a witness, and therefore cannot in general be compelled to answer a bill for a discovery; for such a bill can only be to gain evidence, and the

(*a*) Part IV.

answer of the defendant cannot be read against any other person, not even against another defendant to the same bill (*b*). The question whether a party might be examined as a witness is not decisive of the propriety of making him a defendant to a bill for equitable relief, though it may determine whether he be a proper party to a bill for discovery merely. In frequent instances, the sole objection to the examination of a defendant in equity as a witness, is that which arises from his being a party to the bill. The defendant may be brought before the court in some character necessary to substantiate the suit, that there may be proper parties to it (*c*). It will not be sufficient to object to discovery, in such a case, that the defendant might be examined as a witness.

It would be beside the purpose of these observations to enter into an inquiry of the interests which must be represented in suits for equitable relief. It will be sufficient to observe, that the question seems to be, whether the party has any interest to convey, give up, or receive; and, if not, whether he stands in such a situation that all the court can demand is his testimony in a cause between the plaintiff and the defendant (*d*), for if that be his situation, he is clearly an improper party to the bill.

The nature of this objection to answer is there-

(*b*) Ld. Red. Tr. 188; and see Id. 160, 234, 235, 283.

(*c*) Ld. Red. Tr. 11; *Finch* v. *Finch*, 2 Ves. 493; *Wrottesley* v. *Bendish*, 3 P. Wms. 235.

(*d*) 14 Ves. 252, per Ld. Eldon. See Ld. Red. Tr. 163, 179; *Turner* v. *Robinson*, 1 Sim. & St. 3; 3 P. Wms. 311, (n).

fore to be regarded in a very different point of view where the bill prays relief, and where it seeks discovery merely. Where the bill prays relief, according to a rule which is stated elsewhere (*e*), if it be determined that the plaintiff has no title to relief against the whole or against some of the defendants, he will have no title to discovery as against such parties.

Section 2.

Of the Rule that there cannot be a Prayer for Relief against some Defendants, and for Discovery only against Others in the same Bill.

It is a rule, that to a bill for relief there can properly be no defendant who may not be affected by the decree of the court with respect to the subject-matter of the suit (*f*), or against whom some particular decree be not prayed (*g*). It is essential to a bill for relief that it seek some decree as against all the parties who are made defendants to it, or a demurrer will lie (*h*).

Arbitrators, attornies, and others, have been sometimes made parties, although they have no interest to convey, give up, or receive (*i*). These

(*e*) See Part I. Chap. I. Sects. 3, 4, pp. 6, 11.
(*f*) 14 Ves. 252.
(*g*) 15 Ves. 164.
(*h*) 15 Ves. 164; *Smith* v. *Snow*, 3 Madd. 10.
(*i*) Ld. Red. Tr. 160; *Dummer* v. *Corporation of Chippenham*, 14 Ves. 252.

parties may, however, by their conduct in respect to the subject, have incurred liabilities rendering them interested in the issue of the suit. In all those cases in which a person without interest in a particular question has been made a party, it has been done because there has been a charge against him, not respecting the question, but respecting the cause (*k*). Where an award is impeached on the ground of gross misconduct in the arbitrators, they may be ordered to pay costs (*l*); and where attornies are involved in the fraud of their principal, though a reconveyance or other relief cannot be prayed against them, yet rather than that the plaintiff shall not have his costs (*m*), the court will decree them to be paid by the agent implicated. There must, nevertheless, to sustain the bill against him, be a prayer that such a defendant may be decreed to pay the costs (*n*); and it would seem that it is only in such cases that they can properly be made defendants (*o*).

It is remarked by Lord Eldon, that there have

(*k*) *Day* v. *Drake*, 3 Sim. 70, per Lord Ch. Baron Alexander.

(*l*) *Lingood* v. *Croucher*, 2 Atk. 395; *Ward* v. *Periam*, cited 2 Atk. 396; 2 Ves. 316; 1 Turn. 131, n.; *Chicot* v. *Lequesne*, 2 Ves. 315; Ld. Red. Tr. 161; 2 Eden, 133; *Lord Lonsdale* v. *Littledale*, 2 Ves. jun. 453. Contra, *Steward* v. *E. I. Comp.*, 2 Vern. 380; misreported or of no authority, 14 Ves. 249, 254.

(*m*) *Bowles* v. *Stewart*, 1 Sch. & Lef. 227; *Bennet* v. *Vade*, 2 Atk. 328.

(*n*) *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164.

(*o*) Ld. Red. Tr. 160; *Goodman* v. *Sayers*, 2 Jac. & W. 249; *Fenwick* v. *Reed*, 1 Mer. 114.

been cases upon bills for relief, in which persons in the situation of agents to sell, auctioneers, and others, have answered as defendants, and where it would be very difficult to say that any relief could be prayed against such parties, unless it were founded upon their having some interest, as holding deposits, which would frequently entitle the plaintiff to a decree against them (*p*).

An attorney or agent may, in a special case, be made a defendant, on the ground of being in possession of deeds or vouchers belonging to the plaintiff, which the defendant refuses to produce; the bill praying a delivery (*q*). It is very unusual, and generally improper, to make an attorney party to a bill seeking a discovery and production of title deeds, merely because he has them in his custody; for the possession of the attorney is the possession of the client: but cases may arise to render such a proceeding advisable (*r*), and in such a case it would seem that the relief sought by the prayer for delivery, will support the bill against such a defendant (*s*).

(*p*) *Fenton* v. *Hughes*, 7 Ves. 289.

(*q*) *Fenwick* v. *Reed*, 1 Mer. 114; *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164; *Day* v. *Drake*, 3 Sim. 66, 71, 72; *Bond* v. *Northover*, 1 Y. & Coll. 221.

(*r*) *Fenwick* v. *Reed*, 1 Mer. 123.

(*s*) S. C. Id. 117.

Section 3.

Of the Rule that a Party whom the Plaintiff may examine as a Witness, cannot be made a Defendant to a Bill of Discovery.

In a case before Lord Hardwicke (*t*), a subscribing witness to a will was made a defendant to a bill by the heir at law, to discover the circumstances attending the execution, charging that the defendant claimed an interest. The demurrer of the witness, supported by a disclaimer, was overruled as informal; but it was held that any witness might defend himself to such a bill, by pleading and supporting it by an answer. The reason assigned for the rule is, the mischief of enabling one party to discover what will be the testimony of a witness for the other, thereby affording him an opportunity of collecting evidence to encounter and contradict it (*u*). "The principle," says Lord Hardwicke, "is right, that you cannot make one a defendant to a bill who is merely

(*t*) *Plummer* v. *May*, 1 Ves. 426.

(*u*) S. C. 1 Ves. 427; *Dinely* v. *Dinely*, 2 Atk. 394. See *Newman* v. *Godfrey*, 2 Bro. C. C. 332, where Lord Kenyon looks to another kind of inconvenience. *Cartwright* v. *Hateley*, 1 Ves. jun. 291; S. C. 3 Bro. C. C. 238; *Weymouth* v. *Boyer*, 1 Ves. jun. 416; *Williams* v. *Farrington*, cited 3 Bro. C. C. 239; *Shepherd* v. *Roberts*, 3 Bro. C. C. 239; *Cookson* v. *Ellison*, 2 Bro. C. C. 252; *Mayor &c. of London* v. *Levy*, 8 Ves. 404; *Fenton* v. *Hughes*, 7 Ves. 288. There would seem to be great difficulty in distinguishing this plea, to bills for discovery, from pleas to the person of the defendant. See Ld. Red. Tr. 234.

a witness, in order to have a discovery of what he can say to the matter, though he is properly examinable as a witness." "If that were barely the present case," he added, "I should at once allow the demurrer. But, as against a party interested, the plaintiff is entitled to have a discovery; and it is not his being made a witness that will prevent this discovery."

This judgment of Lord Hardwicke was insisted on in support of a bill of discovery in a recent case (*v*). It was said to have been laid down in *Plummer* v. *May*, that where interest is alleged, the question does not depend merely on the plaintiff to a bill of discovery or relief having it in his power to call the defendant as a witness, but that if the witness has an interest, he may be made a party to the bill (*w*). And it was urged that the observations in that case plainly import, that though you may call a party so circumstanced as a witness, yet you are not bound so to call him, but may have a discovery from him as a party (*x*). It may be remarked, that the observation of Lord Hardwicke seems to extend no farther than this,—that the circumstance of a party being a subscribing witness to a will which is impeached, is not of itself a ground for demurrer to a bill imputing to that witness a participation in the fraud. The proposition that against a party interested the plaintiff is entitled to have a discovery, ap-

(*v*) *Tooth* v. *Dean and Chap. of Canterbury*, 3 Sim. 49.

(*w*) S. C. Id. 53.

(*x*) 3 Sim. 55.

plies, in its full extent, to no other than bills for relief. Lord Eldon, commenting on the case, observes, that there was a charge that the party had an interest; and it may be collected from the last passage of the judgment, that it was not a mere charge of interest, but of such species of interest that at the hearing there might have been a decree for an account against him; and his lordship adds, "as to that case, I can only say, unless it was upon a bill for relief, I do not know how to understand it (*y*)."

Section 4.

Of the Effect of Incompetency in a Witness.

The interest which is sufficient to render a witness incompetent, may be favourable to the plaintiff in equity, or it may be adverse to him. The charges of interest were compared to an examination upon the *voir dire*, but this ground was rejected; for the questions are asked with a different object, and a plaintiff cannot examine upon *voir dire* a witness produced by himself, as the defendant on this argument must be taken to be (*z*).

(*y*) *Fenton* v. *Hughes*, 7 Ves. 290. See Beames' El. Pl. 131, n. (4); *King* v. *Martin*, 2 Ves. jun. 641. Also a bill for relief, Id. 643. The case of a will impeached, adverted to by Lord Loughborough, seems to be likewise intended of a bill for relief. *Cotton* v. *Luttrell*, 1738, cited Ld. Red. Tr. 162.

(*z*) *Plummer* v. *May*, 1 Ves. 427.

If the interest which occasions the incompetency be favourable to the plaintiff in equity, and he is thereby precluded from examining the party at law, it cannot then be justly said that the ground of exclusion from a bill of discovery is, that the plaintiff might examine him as a witness, for that would not be permitted against the consent of the opposite party. The objection in such a case takes another shape. The defendant may demur to the bill, for the answer would be wholly inadmissible as evidence, and therefore nugatory (*a*).

It may be urged, that cases might arise where the legal interest of the witness is favourable to the plaintiff in equity, whilst the party himself may, from other reasons, refuse to afford the plaintiff the information he requires. This is answered by recurring to the principle upon which equity interferes to compel a discovery. The only recognised purpose of this interference, upon all the modern authorities, seems to be that of obtaining an answer to be used as evidence in a suit or action. In a decision of Lord Talbot, another ground was adopted. It was said, that though the answer could not be read as evidence, yet it might be useful in directing the plaintiff to the means of eliciting other evidence (*b*). This object has, however, been discountenanced by Lord Eldon (*c*).

(*a*) See 3 P. Wms. 235, 15 Ves. 166.

(*b*) *Wych* v. *Meal*, 3 P. Wms. 312. See 1 Ves. & B. 546; 5 Ves. 325; 7 Ves. 289; 15 Ves. 165.

(*c*) *Fenton* v. *Hughes*, 7 Ves. 289; *Le Texier* v. *Margravine of Anspach*, 15 Ves. 166. See Ld. Red. Tr. 188.

If the interest which would create the incompetency be adverse to the plaintiff in equity, he has it in his power to waive the objection, and examine the witness at the trial. A bill of discovery cannot therefore be brought against a party so situated. Where a *qui tam* action had been commenced, to recover penalties for an usurious contract, the defendant filed a bill against the plaintiff and another person for a discovery, charging that the action was brought at the instance of the latter, by whose contrivance the transaction which formed the subject of the action was effected. The defendant, who was not the plaintiff at law, demurred, for that he might be examined as a witness, and the demurrer was allowed. "It is impossible," said Lord Eldon, "that he can be examined at law against the plaintiff if the bill is true, for he may be examined upon the *voir dire*, and then his interest will come out. It is impossible, also, for the plaintiff at law to prevent his being examined for the defendant, for he may waive the objection of his interest (*d*)."

(*d*) *Fenton* v. *Hughes*, 7 Ves. *Chapter of Canterbury*, 3 Sim. 290. See *Tooth* v. *Dean and* 49.

Section 5.

Of Cases where the Examination at Law would be Imperfect or Ineffectual.

It was observed by Lord Eldon, in a case which has been cited, that the question was, whether the party could be examined at law for the plaintiff in equity, with the same benefit that would result from a discovery in this court (*e*). In that case he thought that the defendant could not be examined at law, by parol, so effectually as in equity by writing. The defendant, who demurred, was charged with having brought about the usurious contract by introducing the parties to each other for the purpose, and with having subsequently instigated the plaintiff at law to bring the action. The defects in the examination at law were considered to be, first, that a *subpœna duces tecum* was not so effectual an operation for the production of books and papers as a subpœna upon a bill in equity; and, secondly, that in a transaction where the fact of usury was to be made out by proof of the nature and quality of the goods, to ascertain if the sale were colourable, inspection might be material. But it was held that a bill of discovery against a mere witness could not be sustained upon distinctions arising out of the circumstance, that the production of papers, and the

(*e*) *Fenton* v. *Hughes*, 7 Ves. 290.

inspection of goods, might be better compelled in equity (*f*).

Where a dean and chapter demised a parsonage, and all manner of tithes, and the lessees brought a bill against the occupiers and the vicar for the tithe of hops, the defendants filed a cross bill against the dean and chapter and their lessees, averring that the plaintiffs and their lessors were entitled to the tithes of corn and grass, and no other; and that all the small tithes belonged to the vicar, and were satisfied by the payment to him of certain moduses, and prayed a discovery and production of grants, leases, terriers, and surveys in their possession. To this bill a general demurrer by the dean and chapter was allowed (*g*).

The observation of Lord Eldon which has been cited, with regard to the comparative benefit to be derived from the examination at law and in equity, was urged as an authority for the proposition, that if there could not be a beneficial examination of the party as a witness in a court of law, he might be made a defendant to a bill in equity (*h*). It was said that the defendants could not be examined in a court of law so as to give the plaintiffs the information to which they had a right. "Could the dean and chapter be summoned by *subpœna* to give evidence? How were they to be compelled to produce the papers and writings? If they were to be compelled

(*f*) *Fenton* v. *Hughes*, 7 Ves. 291.

(*g*) *Tooth* v. *Dean and Chapter of Canterbury*, 3 Sim. 49.

(*h*) S. C. 3 Sim. 59.

by *subpœna duces tecum*, how were they to be served with it? Were all the individual members to be served? No one member had them in his possession. They were in the custody of the body at large."

The case of *Fenton* v. *Hughes* does not, however, seem to be well applied as an authority for the purpose for which it was here cited. The cross bill against the dean and chapter was merely for discovery, and their interest, if they possessed any, was an interest adverse to the plaintiffs, and which they might therefore waive. No principle interfered to prevent their examination, and the case of *Fenton* v. *Hughes* seems to be decisive, that a mere defect or inconvenience in the examination of a witness is not a sufficient ground to make him a defendant to a bill for discovery.

In opposition, however, to this principle, a case has been cited in the Exchequer, of a tithe suit instituted against certain persons who were tenants of Lord Rivers, where there was a distinct bill for relief against the tenants, and a bill of discovery against Lord Rivers. The court, it is said, were of opinion, that as against one who was both landowner and impropriator, the party was entitled to a discovery (*i*); and it has been insisted in argument, that, on a bill for tithes, the plaintiff is entitled, on general principles, to bring the owner of the lands before the court, in order to obtain from him a dis-

(*i*) *Mitchell* v. *Rabbeth*, cited 3 Sim. 67, 78, 83.

covery of documents in aid of the plaintiff's title (*k*). It seems, however, contrary to the general rule, where the bill is, as against the landowner, merely for discovery.

Section 6.

Of Praying Relief against Interested Parties withholding Evidence, though otherwise merely Witnesses.

The inconvenience that may arise from the absence of any effectual means of procuring all the material evidence in the possession of a person who is not a party to the action or suit, and yet is hostile to that party who stands in need of the evidence, has pressed strongly upon the court. It is seen that the existence of this difficulty is not ground for a bill of discovery, and the question seems to be, whether it affords foundation for a bill praying relief. In the case of *Fenton* v. *Hughes* (*l*), Lord Eldon said, "I will not say, as it is not necessary to determine, whether a bill for relief might not be filed upon the ground that the examination at law must be of necessity defective for bringing forward all that conscience requires, and that what is withheld is withheld by a person having an interest in the question."

In a late case in the Exchequer (*m*), to a bill by

(*k*) 3 Sim. 75. (*l*) 7 Ves. 291. (*m*) *Day* v. *Drake*, 3 Sim. 64.

a rector against an occupier of lands, for an account and payment of great and small tithes, the Duke of Norfolk, the landowner, was a defendant; and it was made a bill for relief against him, by praying that the plaintiff's right to tithes might be established, and that the Duke might be ordered to pay costs. In support of this prayer, the bill charged the Duke with acting in concert with the other defendant, the occupier, in resisting the plaintiff's demands. The defendants were charged with having deeds and papers which were evidence in support of the matters alleged in the bill, and with intending to prevent the plaintiff from having access thereto, or compelling a discovery thereof. A general demurrer by the Duke was overruled, on the ground that the plaintiff was entitled to an answer to some parts of the bill. The Duke then put in a demurrer and answer. The answer admitted the ownership, and the interest of the Duke in the question, but denied that he had any interest in the particular suit, and any purpose of preventing the plaintiff from having access to, or compelling a discovery of the documents. The court overruled the second demurrer. Alexander, C. B., seemed to consider, that, in a suit for tithes against the occupier, the defendant could not insist that the landowner ought to be a party; but if the plaintiff chose to make him a party, the landowner could not demur; for if that were permitted generally, supposing the question to be, whether a modus should protect the land from payment of tithes in kind, great inconvenience would ensue, and

injustice be often done: the tithe-owner would be disappointed of the discovery to which he was entitled. He did not think that a decree could be made upon this bill establishing the right of the clergyman to tithes in kind, which was, except the costs, the only relief prayed against the Duke; but he thought that the right to the discovery was that, in fact, which supported the bill against him. It was held that the Duke of Norfolk was bound to make a discovery of any documents he had in his possession which might throw light upon the question of a modus, and that he must deny the possession of the deeds, it not being sufficient to answer the mere collateral charge. It is said that the Duke of Norfolk intending to appeal to the House of Lords from this decision, the suit was compromised.

In this case it would seem that the allegations imputing fraudulent conduct to the defendant were negatived by the answer; it was admitted that the right to tithes could not be established in that suit; and no charge remained to support the prayer for relief, unless it were founded upon the title to a production of documentary evidence. This may be referred to the ground suggested by Lord Eldon, that it is against conscience for a defendant, having an interest in the question, to withhold evidence which would support the case of the plaintiff.

On this point, a case may be mentioned where the bill prayed a discovery from the wife of a defendant, who as a witness is incompetent either for or against her husband. It was charged that she had

possessed herself of vouchers for receipts and payments, material to the plaintiff's case. Lord Eldon allowed her demurrer, but guarded his judgment by observing, that he would not decide what would have been the effect if the bill had prayed a delivery to the plaintiff of the vouchers in question, thereby making it a bill for relief against the wife (*n*). The principles laid down in this case do not, however, appear favourable to the bill, as against the wife, even had it been so framed.

Section 7.

Of Discovery from a Bankrupt or a Party who has Assigned his Interest.

Some doubt has been entertained as to the application of this rule to the case of a bankrupt. It is stated by Lord Redesdale, that though a bankrupt made party to a bill against his assignees touching his estate may demur to the relief, all his interest being transferred to his assignees, yet it seems to have been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read

(*n*) *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164.

against his assignees; and otherwise, it is added, the bankruptcy might entirely defeat justice (*o*).

On this point it is to be observed, that this is a part of the edition of Lord Redesdale's treatise, which was published prior to the establishment of the general rule that a demurrer to relief extends also to the discovery (*p*), and the case of a bankrupt is not exempted from the operation of that rule (*q*), to which extent, therefore, the above passage has become inaccurate.

It has been thought that a bankrupt might still be made a party to a bill for an injunction against his assignees, for the purpose of a discovery, in support of the injunction (*r*). It was said by Sir T. Plumer, V. C. (*s*), that he was not able to find a case which supported that opinion, though the knowledge that it was the received practice was sufficient to induce him not lightly to disturb it. "There is certainly," he added, "great convenience in this, as in such a case all the transactions may be known to the bankrupt alone, and the party seeking relief

(*o*) Ld. Red. Tr. 161; *De Golls* v. *Ward*, Hil. 1732, cited 3 P. Wms. 311, n. (I); Ld. Hen. Dig. 3rd ed. p. 351.

(*p*) Part I. Chap. I. Sect. 3, p. 6.

(*q*) *Whitworth* v. *Davis*, 1 Ves. & Be. 550.

(*r*) See 2 Eden, 133, whether the answer of arbitrators could be read against other defendants. *Mullins* v. *Symmons*, Bunb. 196. The answer of one defendant may be read against another in an interpleading suit. *Bowyer* v. *Pritchard*, 11 Price, 103. For the effect of the answer of a trustee against whom the plaintiff does not desire a personal decree, see *Morse* v. *Royal*, 12 Ves. 361.

(*s*) *Whitworth* v. *Davis*, 1 Ves. & B. 548.

would be entirely deprived of it, as far as regards the injunction, if a discovery cannot be obtained from the only party having a knowledge of the transaction. There is, however, a difficulty, consistently with the rule and principle, to conceive how the bankrupt's answer can be read against his assignees, even for the purpose of an injunction (*t*), when clearly it could not be read against them at the hearing."

It has been held that a bankrupt cannot be made a party, with his assignees, to a bill for discovery merely, for the purpose of defending an action at law brought by the assignees against the plaintiff (*u*). The only question which remains, therefore, is, whether a bankrupt can be made a party to a bill for relief against his assignees, praying merely a discovery against him.

The inconvenience which it has been suggested might result from the application of this rule in the instance of bankruptcy, can only proceed from a defect of evidence. But the rule which excludes the bankrupt from being made a party to obtain a discovery, rests upon the ground that he may be examined as a witness. "The case of *Fenton* v. *Hughes*," said the vice-chancellor, "lays down a broad principle,

(*t*) See *Glassford* v. *Jeffrey*, cited 1 Ves. & B. 546, 549, where, the bankrupt having submitted to answer, the assignees referred to it, and it was then read against them.

(*u*) *Griffin* v. *Archer*, 2 Anst. 478, cited 2 Ves. jun. 643; 1 Ves. & B. 549; contrà, *Sharpe* v. *Gamon*, 2 Vern. 32. The bankrupt may file a bill of discovery in aid of his defence, against a creditor who sues him at law. *Lowndes* v. *Taylor*, 1 Madd. 423.

that would exclude this bankrupt as a party: viz. that a person who has no interest, and is a mere witness, against whom there could be no relief, ought not to be a party. A bankrupt stands in that situation: a competent witness, having no interest, against whom, therefore, no relief can be had at the hearing; he falls precisely within the general rule, and the cases of exception, stated by the lord chancellor, do not comprehend him (*v*)."

It has been said, that it might be necessary to make a bankrupt a defendant, to enable the plaintiff to frame the interrogatories on which he is to be examined as a witness (*w*). Upon this principle the exception to the rule in the case of an agent or officer of a corporation has been sometimes placed; but Lord Eldon remarked, that it was very anomalous to make a person a defendant in order to enable yourself to deal more successfully with those whom you have a right to put upon the record (*x*); and there does not seem to be any authority for extending to a bankrupt a principle, which is uniformly regarded as a stretch of the court to prevent the failure of justice (*y*).

The conclusion of Sir T. Plumer, in the case which has been cited, is, that a bankrupt is within the principle, and is not one of the persons included in the exceptions. The point, however, was not involved in that case; and he added, "merely stating

(*v*) 1 Ves. & B. 549.
(*w*) 1 Ves. & B. 546.
(*x*) *Fenton* v. *Hughes*, 7 Ves. 289.
(*y*) *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164.

the result of my inquiries, I desire not to be understood as opposing my opinion, though formed upon a consideration of the principle and authorities, to any current opinion prevailing as to the practice (*z*)."

It may be added, that, if a bill charge the bankrupt with acts of fraud, which, if proved to be true, would entitle the plaintiff to a decree against him, the bankrupt cannot demur to such a bill; for, notwithstanding the bar by the bankruptcy, the charges of fraud must be answered (*a*).

Upon the same principle, Lord Redesdale adds (*b*), it seems also to have been considered, that where a person having had an interest in the subject of a bill has assigned that interest, he may yet be compelled to answer with respect to his own acts before the assignment. No reported case, establishing this exception, has, however, been adduced.

Section 8.

Of the Exception to the foregoing Rules in the case of an Officer or Member of a Corporation.

This exception is explained in a decision by Lord Talbot on a bill against the East India Company,

(*z*) 1 Ves. & B. 550.

(*a*) *Lloyd* v. *Lander*, 5 Madd. 290; Ld. Red. Tr. 162; *King* v. *Martin*, 2 Ves. jun. 641 affirmed on rehearing, 1 Ves. & B. 549. See 5 Madd. 48; Ld. Hen. Dig. 3rd ed. p. 440.

(*b*) Ld. Red. Tr. 161.

where one of the officers of the company was made a defendant, in order to discover some entries and orders in the books of that corporation. It was urged in support of a demurrer, that the defendant had no interest in the subject; that his answer, if obtained, would be no evidence against the company; that there could be no decree against him; and that the plaintiff might examine him as a witness. And it was said, that, upon the same principle, the plaintiff might make the servant of any private person a defendant. It was held, however, that there was a difference between the case of a private person and that of a corporation, for the latter can only answer under their common seal, and there is therefore no indictment for perjury, though they answer never so falsely; and that it may be useful to direct the plaintiff how to draw and pen his interrogatories towards obtaining a better discovery. The discovery was also said to be in conformity with the usual practice at that period (*c*).

This exception has been regarded as a stretch of the court to prevent a failure of justice (*d*); and it has been argued, that it ought to be confined to a discovery of vouchers or writings against a mere officer of the corporation, and to cases affecting the corporation only, and not the individual members (*e*).

(*c*) *Wych* v. *Meal*, 3 P. Wms. 311; *Anon.* 1 Vern. 117: contrà, *Steward* v. *E. I. Comp.* 2 Vern. 380: but see 14 Ves. 249, 254. It is presumed that the Corporation must be parties with their officer, or this principle cannot apply. *Gregg* v. *Cotton*, Nels. R. 24.

(*d*) *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164; *Fenton* v. *Hughes*, 7 Ves. 289.

(*e*) *Dummer* v. *Corporation of Chippenham*, 14 Ves. 246.

The reporter of *Wych* v. *Meal*, in a note to that case, adds, that however the rule may hold in general, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree; yet, the determination of Lord Talbot, in the particular circumstances of the case, appears to have been founded on great reason and justice (*f*). The principle has been supported by subsequent authorities (*g*); and Lord Eldon, in reference to it, has said, that though he would be unwilling to go farther than the court has already gone upon this point, he was authorized and called upon to go the fair length to which a just application of the principle would lead (*h*).

A bill was brought by the master of a free school against the corporation of a borough, who were trustees of the charity, alleging that the plaintiff had been duly appointed to his office, and had held it for many years, but that he had been deprived of it by a resolution of the bailiff and a majority of the burgesses, on the pretence of his incapacity, and, in reality, in consequence of a scheme of five of the defendants, in which they were actuated by resentment and party spirit against the plaintiff, and were not guided by any view to the benefit of the charity. The bill prayed an answer from the defendants in

(*f*) 3 P. Wms. 311, n. (I); *Moodalay* v. *Morton*, 1 Bro. C. C. 468. The remarks of Sir John Leach, V. C., on the latter case (1 Sim. & St. 90, 91), do not appear to refer to this point.

(*g*) *Dummer* v. *Corporation of Chippenham*, 14 Ves. 252; 7 Ves. 289; 15 Ves. 164; *Gibbons* v. *Waterloo Bridge Comp.* 5 Price, 491.

(*h*) 14 Ves. 252.

their corporate capacity, and that the five defendants particularly named might answer upon oath. It also prayed an injunction to restrain the defendants from carrying the resolution into effect. The five defendants demurred for want of title in the plaintiff to the discovery against them. The lord chancellor said, that, "if these persons, trustees of a school for a charitable purpose, were acting as individuals, this court would have no difficulty in dealing with them; and there is no doubt the court will compel a corporation who are trustees to act as they ought." "A trustee of either description, a corporation, or an individual, cannot be permitted to act corruptly in the execution of the trust." "The questi onupon this case is, whether the court can entertain a bill against these individuals, as parties, to obtain a discovery, whether, through their means, manifested as stated in the bill, there was such an abuse of the discretion vested in the corporation, as trustees, as this court will reform." "The case of *Wych* v. *Meal* furnishes the principle." "If such a transaction as this can take place, and there is no remedy, the consequence is inevitable, that every corporation, a trustee for charitable purposes, will have the power of eluding entirely the jurisdiction over charitable subjects." The demurrer was overruled (*i*).

The principle extends to the individual members of a corporation, as well as to its officers. There seems, said Lord Eldon, to be no sound distinction

(*i*) *Dummer* v. *Corporation of Chippenham*, 14 Ves. 245.

between an individual and the town clerk or servant. "There may be no officer for the time, and this individual perhaps may be the only person who can give any information. The reason of making the clerk or officer a party is, that, generally, he is the person who can give the information (*k*)." Adverting to the order in the case in *Vernon* (*l*), that, besides the clerk of the company, such principal members as the plaintiff should think fit should answer upon oath, Lord Eldon adds, "Suppose an individual corporator, whose estate was charged with a rent or payment to a charitable use of which the corporation had the management, had obtained possession of the deed, and had destroyed or cancelled it. Upon an information in this court for the purpose of having the estate of the charity properly administered by the corporation, who are trustees, it would be perfectly competent to call upon the mayor, if he was the individual implicated in that conduct, not only to answer with the rest under their common seal, but also to answer as to the circumstances relative to that deed supposed to be in his hands (*m*)."

It is not in every case where the inconvenience or possible failure of justice may occur, that a similar principle will be applied. To a bill against a married woman and her husband, charging that the former had acted as agent to the latter, and had possessed herself of vouchers for receipts and payments by the plaintiff, and that many of the pay-

(*k*) 14 Ves. 251. (*l*) *Anon.* 1 Vern. 117. (*m*) 14 Ves. 254.

ments rested in the personal knowledge of the defendants, and praying discovery and account, the wife demurred, and her demurrer was allowed; for it was said, that, before a married woman can be made a party as an agent, upon the same principle that the agent of a corporation is made a party, other principles must be broken through long acknowledged by the law, arising out of the relation of husband and wife; and that the argument on the particular mischief is sufficiently met by the observation, that it must be endured rather than a general mischief should be introduced (*n*).

The ground of inconvenience upon which the exception to the general rule is admitted, cannot, it is evident, apply to cases where the corporation and its members are indifferent in point of interest. Where an officer of the bank was made a party, for the purpose of a discovery as to the times when stock in question in the cause had been transferred, his demurrer was allowed, the officer being in this case merely a witness (*o*).

(*n*) *Le Texier* v. *Margravine of Anspach*, 15 Ves. 164. So, if the bill be for discovery only.

Barron v. *Grillard*, 3 Ves. & B. 165.

(*o*) *How* v. *Hase*, 5 Madd. 19.

CHAPTER III.

OF DISCOVERY BY A PURCHASER FOR A VALUABLE CONSIDERATION WITHOUT NOTICE.

SECTION 1.

Of the General Rule.

IF the title of the defendant be equal in conscience to the title of the plaintiff, equity, which looks to the conscientious obligations of the parties, will not interpose to compel a discovery (*a*). It is under this principle that a purchaser for a valuable consideration, without notice of any claim upon the estate, may defend his possession and refuse to make any disclosure which might endanger it; for a purchaser may, subsequent to his purchase, have found out a defect in his title, and if he should produce title deeds, they may be made use of to overturn his title at law (*b*).

It can hardly appear upon the face of a bill that the defendant is in such a situation; and therefore the benefit of this defence must generally be taken by plea; but if the case should be so stated, the de-

(*a*) Ld. Red. Tr. 135, 274; 2 Sugd. V. & P. 258, 9th ed.
(*b*) 3 Atk. 302.

fendant might demur, because the case stated would appear to be one in which a court of equity ought not to assume jurisdiction (*c*).

It is the province of a work more directly on the subject of pleading to treat of the form of this plea, and the averments which are necessary (*d*); and it would be needlessly extending the present inquiry to enumerate the cases in which it is a valid defence to equitable relief (*e*). In conformity with the plan adopted here, it will suffice to observe, that if this plea be offered to a bill praying relief, the discovery must depend upon the title to relief (*f*). If there be at the same time discovery sought of matters which the plea does not cover, the case falls within the rules which have been considered with respect to accompanying the plea with an answer (*g*). If there be no facts charged in the bill as evidence of notice, or inconsistent with the substantial validity of the plea, the general denial of notice by the plea is sufficient, and an accompanying answer is unnecessary (*h*).

(*c*) Ld. Red. Tr. 135.

(*d*) See Ld. Red. Tr. 274.

(*e*) See 2 Sugd. V. & P. 258, et seq.

(*f*) Part I. Chap. I. Sects. 3 & 4, pp. 6, 11.

(*g*) Part I. Chap. II. p. 25.

(*h*) *Pennington* v. *Beechey*, 2 Sim. & St. 282.

Section 2.

Of Discovery of Deeds by a Purchaser not Entitled to the Possession of the Estate.

If the plaintiff at the death of a tenant for life entered into possession of an estate to which he was entitled in remainder, and the defendant held the title deeds of the same estate by virtue of a mortgage made by the tenant for life for a period exceeding his life estate in duration, having deceived the defendant by a suppression of the deed which would have shewn his real interest, a question was made, whether, assuming that the defendant could not use the deeds to recover the estate, he should be allowed to retain them to the vexation and mischief of the plaintiff, and without profit to himself. Lord Rosslyn held, that as by law the defendant could not hold the deeds, it was against all conscience to refuse to describe that which the plaintiff by the admission of the defendant had a right to recover. "It by no means follows," he said, "that every species of deed that may be in his possession should be directed by this court to be delivered up, but it would be extremely pernicious to permit him to close his mouth and to refuse any account whatsoever. Suppose counterparts of leases were delivered to the defendant,—they are of no value except to the actual owner; not of so much value as a clear skin of parchment. So surveys, maps, rent-rolls of a manor: they are of no intrinsic value; they are of

value to the owner of the estate of which they are the muniments, and the enjoyment of which is carried on by means of them." "It ought to be considered what these title deeds may be. If there are none of which the defendant can make any advantage, he is, without any beneficial interest or profit to himself, retaining what may be a profit and advantage to the plaintiff." "Till the discovery is made, it is impossible to know whether any relief can be given; therefore the proper order will be, that the plea shall be overruled as to the discovery, and shall stand for an answer with liberty to except (*i*)."

In cases of this kind, the description of the deeds is that which is objected to; for the description of any one deed may contribute to defeat the title the mortgagee may still hope to maintain (*k*). The foregoing decision was, after much consideration, overruled by Lord Eldon. "The bill," his lordship observed, "is filed by a person having got possession. If the principle is, that the court will not stir against a purchaser for valuable consideration without notice, what are the legal rights of the son, tenant in tail, when his father's life estate determines? His legal rights are, that he shall have possession of the estate: I do not know that I am entitled to say of the title deeds; but that he shall recover in trover the value of the deeds; or in detinue, in which the judgment is for the deeds or the value. But, without attend-

(*i*) *Strode* v. *Blackburne*, 3 Ves. 222.

(*k*) 9 Ves. 27, in arg. See 1 Y. & Coll. 107, in arg.

ing to the imperfection of the law in such actions, which is probably the ground of the jurisdiction here for the specific delivery of the thing, I will suppose his right at law to be the specific delivery. It is true he is not seeking in equity to recover possession of the estate, but he is seeking in equity to recover something which he cannot recover at law, the value of which *non constat* he can recover at law without the discovery of the deeds. Is it of necessity, then, that this court must hold, as against a purchaser for valuable consideration without notice, that if the possession of the estate has been got from him, the possession of the deeds shall be taken out of his hands by this court, and thrown in to the person who has got from him the possession of the estate? Is it not worth consideration, whether the very principle of this plea is not this:—'I have honestly and *bonâ fide* paid for this, in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bonâ fide*?' Is it not worth consideration, whether every plea of purchase for valuable consideration without notice does not admit that the defendant has no title? If he has a good title, why not discover? I apprehend, there is sufficient ground for saying, a man who has honestly dealt for valuable consideration without notice shall not be called upon, by confessions wrung from his conscience, to say he has missed his object in the extent in which he meant

to acquire it. I doubt, therefore, the argument calling upon the court to presume that this man can bring no ejectment; that, if he did, he could not recover; that he has not now the legal fee; that he has not some term vested in him; that he may not be able to procure either; and presuming that, at the hazard of preventing him from doing that very thing, if he is at this moment engaged in the endeavour to do it. The possession of the deeds, at least, is a thing purchased with the estate; and if it happens that the purchase misses its object to this extent,—that the purchaser has had the possession taken from him without the assistance of this court, is there a clear principle that therefore the possession of the deeds shall, with the assistance of the court, be recovered by that person who so obtained the possession of the estate? I am not sure that follows as a principle of sound equity, if the principle be, that, against a purchaser for valuable consideration without notice, this court gives no assistance." The plea was allowed (*l*).

Section 3.

Of Disclosure in the Plea.

The extent to which the defendant must disclose his purchase deeds in this plea has been the subject

(*l*) *Walwyn* v. *Lee*, 9 Ves. 24.

of some difference of opinion. This is distinct from the doctrines of discovery. It is the form of the defence. The purpose of considering it in this treatise, is to distinguish or contrast the nature of the discovery which takes place under this plea, with a view to defence solely, and the discovery which is ordered with a view to evidence, where the ground of resistance is, that the evidence relates to the title of the defendant exclusively (*m*).

This plea was formerly held to extend to the discovery of the purchase deeds (*n*), but it has been since thought that these must be necessarily excepted, for they are pleaded (*o*). It is clear, however, that the deeds of purchase must be stated, and their dates (*p*), parties, and contents, briefly set forth (*q*). Whether the time of execution and the particular consideration should be expressed has been doubted; but it seems both of these particulars must appear. With regard to the time of the execution of the deeds, the contrary had formerly been decided (*r*), and Sir Edward Sugden, in stating the present rule, adds a question, whether this might not enable the plaintiff to proceed against the defendant at law (*s*). The consideration it was one time held unnecessary

(*m*) See Part III. Chap. IV. *Tyler* v. *Drayton*, 2 Sim. & St. 311.

(*n*) *Watkins* v. *Hatchell*, 1 Ab. Ca. Eq. 33; 2 Sugd. V. & P. 304, n. (II).

(*o*) See 2 Ves. 107, 396; 3 Atk. 302.

(*p*) *Chamberlain* v. *Knapp*, 1 Atk. 52.

(*q*) See 2 Sugd. V. & P. 304.

(*r*) *Day* v. *Arundel*, Hardr. 510. But see Ld. Red. Tr. 275.

(*s*) 2 Sugd. V. & P. 304, n. (I).

to set out (*t*), but at present this is always done; and it is observed, in the work which has been quoted, that there can be no objection to state the consideration, as, if it be valuable, the plea will not be invalidated by mere inadequacy. "The question is not whether the consideration is adequate, but whether it is valuable. For, if it be such a consideration as will not be deemed fraudulent within the statute of 27th Elizabeth, or is not merely nominal, or the purchase is such a one as would hinder a *puisne* purchaser from overturning it, it ought not to be impeached in equity (*u*)."

In ordinary cases, it is presumed that the plaintiff would have no right to the *production* of the purchase deeds before trial (*v*).

This plea necessarily requires the discovery of matters, which would shew the quantity of the land or subject matter in question over which the plea substantially extends. It is usual to set out the parcels as they are specified in the purchase deed (*w*). "A jointress," said Lord Hardwicke, "ought to produce her jointure deed, and a purchaser his purchase deed, that it may be seen whether the lands they claim are comprised in their deeds (*x*);" and where the discovery was sought of specific chattels against a pawnbroker, to found an action of trover, a plea was overruled which did not put in issue the fact that the

(*t*) *Moor* v. *Mayhew*, 1 Cha. Ca. 34; *Day* v. *Arundel*, Hardr. 510. But see Ld. Red. Tr. 275.

(*u*) 2 Sugd. V. & P. 306.

(*v*) *Kennedy* v. *Green*, 6 Sim. 6.

(*w*) *Chamberlain* v. *Knapp*, 1 Atk. 52; Beames' El. Pl. 343.

(*x*) *Aston* v. *Aston*, 3 Atk. 302.

defendant held the property specified in the plea, and no other of the property alleged to have been pawned (*y*). A purchaser is not bound to discover the specific things in his possession, for that may be as injurious as the disclosure of his title (*z*); but, if the defendant were not compelled to state, affirmatively or negatively, what he has so purchased *bonâ fide*, it would be impossible to assign the extent of the protection to be allowed to the defendant, or of the relief to be given to the plaintiff.

Lord Rosslyn put the case of a mortgage made by the owner of an estate, partly settled, partly unsettled, the boundaries of which had been confounded during the possession of that owner. "If a person, entitled under the settlement, filed a bill to compel the mortgagee to set out, not the title by which he claims, but the metes and bounds of the estate subject to his mortgage, no plea could go to the extent of that discovery (*a*)." There is here an ambiguity in the meaning of the words, "subject to his mortgage;" for the very question in that case was upon the right of the mortgagee to protect himself by plea from affording information which would enable the plaintiff to wrest from him the deeds which he held. His lien upon the mortgaged premises had failed: the question arose, whether any thing remained subject to his mortgage, and therefore covered by his plea. Lord Rosslyn's conclusion was, that nothing so remained.

(*y*) *Hoare* v. *Parker*, 1 Bro. C. C. 578; S. C. 1 Cox, R. 224; S. C. Ld. Red. Tr. 277, n. (s).

(*z*) 1 Bro. C. C. 581.

(*a*) *Strode* v. *Blackburn*, 3 Ves. 225.

If, in the supposed case, the mortgagee be taken to be out of possession, as in the case then before Lord Rosslyn, it may be presumed that he confined the expression strictly to the unsettled estate, and it implies an opinion that the defendant, in such circumstances, must give every discovery required to distinguish its boundaries. This reasoning is justly questioned, in the argument for the plea, in *Wallwyn* v. *Lee* (*b*). If, it was said, the owner of a settled estate had confounded it with an unsettled estate, and mortgaged both to a person without any notice, and the person claiming the settled estate could not get on with any process without having the boundaries ascertained, the mortgagee could not be compelled to say any thing, upon the common principle, having taken it as an unsettled estate. If, however, Lord Rosslyn, within the terms *subject to his mortgage*, comprehended the whole estate which the mortgagor assumed to convey, the proposition is undeniable.

Section 4.

Of this Plea opposed to a Legal Title.

It follows, from the principle which has been stated, that the plea of purchase for a valuable consideration *bonâ fide*, and without notice of any imperfection in the title taken, will be equally good,

(*b*) 9 Ves. 26.

whether the bill prays relief or discovery merely. Upon this point, however, some observations seem important; for doubts have been suggested whether the plea will avail against a legal title (*c*). The reports of two decisions of Lord Nottingham are directly contradictory. In the first, where the plaintiff was an heir-at-law, he is made to say, that the plea was good against a legal title; for the heir might go into a court of law if he pleased; and that the court will not compel the shewing of writings to any person unless he hath an equitable title (*d*). In another case, he is reported to have holden, that the defendant must answer where the plaintiff has a title in law, but may plead where he has only an equity (*e*). Lord Thurlow, upon the bill of a dowress, held, that where the plaintiff was pursuing a legal title, the plea did not apply, it being only a bar to an equitable claim (*f*). In a late case, where the defendant had submitted to make the discovery, and insisted upon the benefit of this defence to the relief as if he had pleaded it, Sir John Leach, M. R., "following the case of *Williams* v. *Lambe*, and the general principle of equity," was of opinion that the defence was of no avail against a legal title (*g*).

If, by a *legal title*, as the expression is here used, be meant a title upon which a party might sue or

(*c*) See 2 Sugd. V. & P. 308.

(*d*) *Burlace* v. *Cook*, 2 Freem. 24.

(*e*) *Rogers* v. *Seale*, 2 Freem. 84.

(*f*) *Williams* v. *Lambe*, 3 Bro. C. C. 264.

(*g*) *Collins* v. *Archer*, 1 Russ. & Myl. 292.

defend himself in a court of law, it follows, that a plea of purchase for valuable consideration, without notice, could never be a defence to a bill for a mere discovery in aid of a trial at law: for the plaintiff, in such a bill, must stand upon a legal title, according to that construction of the words. There are, however, no authorities which carry the principle to the extent to which, as laid down in terms, it must necessarily go; and, on the other hand, the validity of the plea to discovery, sought alone, seems to be admitted in many cases. In *Strode* v. *Blackburne* (*h*), Lord Rosslyn, reasoning upon the assumption that the deeds there in question must be claimed by the defendant, if at all, as chattels in which he had a substantive property, goes on to inquire where the difference consists between them and the common case of goods, for which trover or detinue lies, and the plaintiff avers that he is in such circumstances that he cannot describe them, and requires an account for that purpose. "Suppose," he adds, "a box of jewels was pledged by a person not the owner, but a mere bailee, the pawnee, supposing the person in possession actually the true owner, and there being no reason to think otherwise, there would be no difficulty in a court of equity in obliging him to explain and set out that property of which he admits the title to be in another, only claiming the value for which it was pledged, a description that will make it the subject of an action at law." Lord

(*h*) 3 Ves. 226.

Eldon, overruling the decision of Lord Rosslyn, remarked, that, as the case of the box of jewels was put, he had great difficulty in assenting to it, for it was assuming the question. "It was very unlike the case of a carrier or bailee, who has no power of disposal; that is, to do what they please with the subject (*i*)."

These observations seem to import, that his lordship's opinion was, that, so far as the case put was applicable to chattels pledged by a tenant for life, it assumed the very principle which it was adduced to prove, and against which he decided; though a title, derived through a carrier or bailee, who has no power of disposal, may not raise the same equity.

The case of *Hoare* v. *Parker* (*k*) is a more direct authority. The bill was against a pawnbroker for the discovery of the particular pieces of plate pawned by the person to whom it had been bequeathed for life. The discovery was sought in aid of an action of trover. Lord Thurlow expressed no doubt, that a purchaser without notice, and for a valuable consideration, might in conscience refuse to assist the right owner in the legal recovery of the subject purchased under such circumstances (*l*). In *Jerrard* v. *Saunders* (*m*), the plaintiff, who entitled himself under a settlement, had entered into possession of the

(*i*) *Wallwyn* v. *Lee*, 9 Ves. 30.

(*k*) 1 Bro. C. C. 578; S. C. 1 Cox, 224; S. C. Ld. Red. Tr. 277, n. (s).

(*l*) The plea was overruled, owing to the omission of a necessary averment.

(*m*) 2 Ves. jun. 454.

premises at the death of the tenant for life, and prayed a discovery and injunction in aid of his defence in two ejectments which had been brought against him by the defendant, who claimed as a mortgagee from the party who had been in possession of the preceding estate. The bill alleged that the defendant had in his custody the title deeds of the estate, and among them the settlement under which the plaintiff claimed, charging knowledge of the trusts of it by the mortgagees prior to the execution of the mortgage; and prayed a discovery and production of the settlement and all the title deeds, and an injunction from proceeding at law in the ejectments. A plea not denying the facts inferring notice was overruled: but the defendant, upon answering to those facts, and stating the mesne assignments under which he derived his claim, was allowed by answer to insist on the benefit of the plea with regard to the other discovery sought (*n*).

Assuming, upon these authorities, and upon the absence of any dictum to that extent, that there is no rule which excludes this plea to every bill of discovery in aid of a legal trial, and that therefore the plea may be a good defence to a *legal itle*, it is not unimportant to examine whether there are any decisions which militate with this proposition. The judgment in *Williams* v. *Lambe* (*o*) may be well explained upon the reasoning of the counsel for the

(*n*) Lord Rosslyn, in this case, denied the authority of *Rogers* v. *Seale*, 2 Freem. 84. But see 2 Sugd. V. & P. 209.

(*o*) 3 Bro. C. C. 265.

defendants in *Collins* v. *Archer* (*p*), and is in that view perfectly consistent with late cases (*q*). Taken, however, as authorities against the validity of this plea to a legal title, these two cases decide, that where the courts of equity and law have concurrent jurisdiction, and the plaintiff, if he proceeded at law could obtain judgment there, but perhaps in a less convenient manner, equity does not permit a defence by plea, the only effect of which would be, not to interpose any principle for the defendant's protection, but merely to exclude its own process. This rule is very distinct from that of refusing the benefit of the plea where the relief sought is purely equitable, or where the court is called upon to put the defendant in a worse situation than he otherwise would be, by compelling him to make disclosures that may expose his title to be defeated at law. The court will not make that remedy certain which the plaintiff may never obtain by other means; but where the plaintiff has a certain remedy, which, for the sake of convenience, equity is accustomed to administer upon legal principles, it will not refuse to exercise its jurisdiction, although the defendant be a purchaser for valuable consideration. The judgment of Lord Thurlow is consistent with this distinction. "The jurisdiction of this court in assigning dower is founded on a pure legal title of the dowress, (so pure that it does not attach upon an equitable estate),

(*p*) 1 Russ. & Myl. 290.
(*q*) See *Jackson* v. *Rowe*, 2 Sim. & St. 472; 2 Sugd. V. & P. 308.

which this court can give effect to with a greater degree of convenience than can be had before a jury on a writ of dower (*r*)." The bill, in the case before Sir John Leach (*s*), sought an account of tithes, and therefore it falls strictly within the same reason. The imperfectly-reported case of *Rogers* v. *Seale* (*t*), taken in connection with the other decisions of Lord Nottingham, can scarcely be deemed an adverse authority (*u*).

The question might arise, if, in such a case of concurrent jurisdiction, the plaintiff chose to pursue his legal remedy, and came to equity for discovery only, whether a plea of purchase to the bill of discovery could be sustained.

(*r*) *Williams* v. *Lambe*, 3 Bro. C. C. 265, (last ed.), Mr. Cox's note of the judgment.

(*s*) *Collins* v. *Archer*, 1 Russ. & Myl. 284.

(*t*) 2 Freem. 84.

(*u*) See 2 Sugd. V. & P. 309; 2 Ves. jun. 457.

CHAPTER IV.

OF THE EFFECT OF A WANT OF PRIVITY.

A WANT of privity between the plaintiff and defendant has been made the subject of a section of Lord Redesdale's treatise, where it is stated as a sufficient defence to a bill in equity, whether taken by demurrer (*a*) or plea (*b*), to relief (*c*), or to discovery only (*d*). On this head of defence it may be observed, that while on the one hand a case would scarcely occur in which it is exclusively applicable (*e*), there seems, on the other, great difficulty in assigning to the term *privity* such a definite meaning as could afford any fixed and certain guide to the

(*a*) Ld. Red. Tr. 158, 159.

(*b*) Id. 234.

(*c*) Id. 158, 234.

(*d*) Id. 189; Beames' El. Plea. 258; Cooper, Tr. Pl. Eq. 174. Difficulty seems to have been felt in assigning to this defence a proper place and character. Treated as an objection to *discovery*, see Ld. Red. Tr. 189; Coop. Tr. Pl. 196, 197. As a defence to *relief*, Ld. Red. Tr. 158, 234; Coop. Tr. Pl. 174; Willis's Prac. Pl. 456, 525, n. (a), (b). As a plea to the *person*, where the bill seeks discovery, Beames' El. Pl. 254; Willis's Prac. Pl. 474.

(*e*) Forms of demurrer, on this ground, are given to *relief*, Willis's Prec. Pl. 456; to *discovery*, Id. 474. Form, substantially the same, not assigning want of privity, 2 Van Hey. Eq. Dr. 81. See Id. 74, n. (16); and see Willis's Prec. Pl. 461, n. (a).

pleader in equity (*f*). The existence of privity may be a matter of ready solution between persons standing in certain relations to each other; but it cannot be made a necessary ingredient in the case of a complainant in a court of justice, without extending its signification so widely as to comprehend all cases in which a suit can be sustained, and then the term is superfluous; or, affixing some narrower definition, founded upon technical reasoning, which must be, after all, inconclusive.

In support of this ground of defence is adduced the case of a bill by a person claiming to be lord of a manor, against another person also claiming to be lord of the same manor, and praying, amongst other things, a discovery in what manner the defendant derived title to the manor,—where a demurrer was allowed, because the plaintiff had shewn no right to the discovery (*g*). And another case, of a bill filed by a person claiming, under a grant from the duchy of Lancaster, to be bailiff of a liberty within the duchy, with a right to all waifs, estrays, and other casualties within the liberty, and all fees and perquisites respecting the same, against the owner of an inn in the liberty, and his tenants, alleging that the inn yard had been used as a common pound within the liberty for all waifs and strays and casualties; and that the tenant, under demise from the owner, had seized and taken all waifs and

(*f*) Ld. Red. Tr. 160, n. (n); Coop. Tr. Pl. 174.

(*g*) Ld. Red. Tr. 189, cites *Adderley* v. *Sparrow*, in Chan. Hil. 1779; 2 Sch. & Lef. 209, S. C.

strays and other casualties, and received the fees and perquisites thereon; and requiring the owner to discover how he derived title thereto,—where also a demurrer to the discovery was allowed (*h*). There is little doubt that these were bills praying some kind of relief. In the judgment of Lord Redesdale, in the case of *Devonsher* v. *Newenham*, he observes, that the same point was decided in *Adderley* v. *Sparrow*, as in *Welby* v. *Duke of Rutland*, which was, that a bill for establishing a legal title cannot be supported before the title has been tried and determined at law (*i*). This is a specific ground of defence, which is not aided by, and does not require, the aid of the principle to which the case is referred in the treatise on pleading.

It has been observed, that a case will scarcely occur, in which a defendant can insist upon this ground of defence, and upon no other. A mere bill of discovery may be brought by either the plaintiff or the defendant in some action or suit. If by the plaintiff, a defence falling within Lord Redesdale's definition of this objection must, it is presumed, rest on the ground that the action will not lie, or that the proceeding cannot be sustained, in aid of which

(*h*) Ld. Red. Tr. 190, cites *Ritson* v. *Sir J. Danvers*, in Duchy Court of Lancaster, 28th Oct. 1787, by the Chancellor, assisted by Lord Loughborough, and Wilson, J.; S. C. 24 Nov. 1790, on demurrer to an amended bill, Thomson, B., assisting; *Att.-Gen.* v. *Sir J. Danvers*, 25th Jan. 1792, Grose, J., and Thomson, B., assisting.

(*i*) 2 Sch. & Lef. 209. See also 2 Atk. 483; 4 Madd. 454. It is probable that *Ritson* v. *Sir J. Danvers* was a bill for an account, which is relief.

the discovery is sought; for, if the action or suit can be supported, that fact must either negative the want of privity, or the want of privity can be no objection. If the bill be by a defendant against the plaintiff, the plaintiff certainly cannot insist that there is no privity between them.

In a collection of precedents founded upon Lord Redesdale's treatise, a form is given of a demurrer to a bill filed by an owner of lands asserted to be tithe free, for discovery of the title of the lay impropriator to the tithes of the parish, within which such lands are situated. This form of demurrer insists that the plaintiff has not, by his bill, shewn such privity of title between him and the defendant, or shewn any such right or title as entitles him to the discovery thereby sought (*k*). The cases cited as authority for this form seem to shew that no such general demurrer to all discovery can be sustained. In *Glegg* v. *Legh* (*l*), which was a cross bill for discovery in a tithe suit, the defendant did not rely on such a defence, but answered part of the bill, and demurred to so much as sought particular discoveries of his title, and the order protected the defendant from the discovery of *his title and his title deeds*, but no farther (*m*).

The objection to discovery for want of privity between the parties, if it be good, must be an objection to the entire bill, or it must be that such a

(*k*) Willis's Prec. Pl. 474.
(*l*) 4 Madd. 193.
(*m*) *Glegg* v. *Legh*, 4 Madd. 193; *Parker* v. *Legh*, cited 4 Madd. 206, 207, 208.

privity exists to support one interrogatory, while it fails as to another. The objection that the discovery sought is of that which is exclusively evidence for the defendant, may extend to more or less of the bill according to circumstances. It is true that where the title of the defendant is not in privity with, but inconsistent with the title made by the plaintiff, it often happens that the defendant is not bound to discover the evidence of the title under which he claims (*n*), but the existence or non-existence of privity is not the criterion. In the cases cited in Lord Redesdale's treatise (*o*), and elsewhere, on the same point, the question was, whether the matters or writings of which a discovery was sought constituted the evidence of the defendant's title, or might be evidence for the plaintiff. It may therefore be concluded, that, so far at least as this ground of defence can extend to discovery, it properly belongs to the class of objections considered in the next Part (*p*), and that it depends upon the principle that the defendant is not bound to disclose the evidence of his title.

(*n*) Ld. Red. Tr. 190. Beames' El. Pl. 258, n. (2).
(*o*) Ld. Red. Tr. 190, n. (h); (*p*) Part III. Chap. IV.

CHAPTER V.

OF THE PURPOSE FOR WHICH EQUITY ASSUMES JURISDICTION TO COMPEL A DISCOVERY MERELY.

SECTION 1.

Of the Rule that the Discovery is given only in aid of some Trial.

TO administer to the ends of justice, without pronouncing any decision upon the rights of the parties (*a*), by possessing the plaintiff, who appears to have a legal or equitable right, of that evidence which is necessary to make a legal or equitable right available (*b*), equity will compel either party to a suit or action to confess or deny upon oath his knowledge of the facts alleged, which tend to sustain the case of the party seeking the discovery. It is given either because the plaintiff cannot otherwise prove the facts, or in aid of proof (*c*).

(*a*) Ld. Red. Tr. 148.

(*b*) 2 Fonbl. Tr. Eq. 487, n. (f).

(*c*) 2 Atk. 241; Ld. Red. Tr. 307. See 17 Ves. 147, where Lord Eldon supposes that it were necessary to prove a conversation between the plaintiff and defendant, and no other person present. For cases of bills before action, see *ante*, p. 51, n. (*y*). *Mendes* v. *Barnard*, Dick. 654; *Emmet* v. *Aylet*, cited Ib.; *Standen* v. *Bullock*, Tot. 9.

The modern authorities relating to this jurisdiction, with perhaps one exception (*d*), recognise no other object in compelling an answer than its use as evidence in some judicial proceeding. It is therefore a rule, that every bill for discovery must allege that the discovery is sought in aid of some judicial proceeding commenced or contemplated. If no such object appears, the bill is demurrable (*e*).

It is probable that even in the more ancient cases the plaintiff was required to entitle himself to the assistance of the court, when he sought a discovery alone, by alleging that he was unable to proceed at law without the discovery. The very scanty information afforded by the early reports renders it necessary to observe great caution in resorting to them as authorities on the present subject. It is but rarely that it can be ascertained whether the bill prayed relief or was merely for discovery, and it is commonly difficult to collect the principle upon which the court proceeded.

(*d*) See Part II. Chap. II. Sects. 7, 8, p. 79, et seq.

(*e*) Ld. Red. Tr. 186; *Cardale* v. *Watkins*, 5 Madd. 18; *Attorney-General* v. *Ross*, 8 Price, 205; *Dinely* v. *Dinely*, 2 Atk. 394; 2 Ves. 492.

Section 2.

Of Discovery after Verdict.

It follows from the foregoing rule, that, if the case has already been tried in another court, and no farther trial remains to be had, the ground for discovery fails (*f*). "Where there is no trial to be had, there can be no discovery to be sought; and if a verdict had passed *simpliciter* without more, a bill then filed for a discovery might be demurred to, for there could be no discovery any more than as to a matter not at issue (*g*)." It is not the province of equity to relieve against the consequences of mispleading, or of indiscreetly conducting the case at law (*h*).

The circumstance that a rule is pending to shew cause why there should not be a new trial, is not sufficient of itself to sustain a bill for discovery, for the rule may be discharged (*i*). "Are we," said Richards, B., "to order a conditional injunction, in case the rule should be made absolute, with the alternative that it shall stand dissolved if the rule should be discharged?" "If a defendant in an action at law submits to go to trial without filing a bill in equity for a discovery of evidence, and after verdict against him attempts to obtain that discovery as a ground

(*f*) *Whitmore* v. *Thornton*, 3 Price, 241.

(*g*) Id. 248; per Richards, B. 1 Swans. 206.

(*h*) See *Protheroe* v. *Forman*, 2 Swans. 232.

(*i*) *Whitmore* v. *Thornton*, 3 Price, 248.

for a new trial, the court of equity will not countenance such a proceeding when there is no fraud in the conduct of the plaintiff at law (*k*)."

If there should have been, in the conduct of the plaintiff at law, that which a court of equity regards as a violation of the duties arising from the relation between the parties, a bill of discovery may be sustained after verdict. In an action of trespass, the question was, whether the *locus in quo* passed in a certain demise; and previously to the trial the plaintiff in equity gave notice to the defendant to produce rent rolls and other documents; but they were not produced, and the defendant obtained a verdict. A new trial was, however, ordered, owing to the rejection of evidence which the plaintiff had tendered. A bill for discovery and production of the papers was then filed, and an injunction prayed to stay trial. "On the motion for a new trial," Lord Eldon observed, "I cannot think that the court of King's Bench would be influenced by the production or non-production of the documents; they would have said only that other measures should have been adopted to enforce production; but on the ground that the judge rejected evidence which he ought to have received and laid before the jury, that court granted a new trial. Now, without referring to the case in the Exchequer (*l*), I entertain no doubt that

(*k*) Ld. Red. Tr. 132; *Trigonnel* v. *Forbes*, Nels. 386; *Sewel* v. *Freeston*, 1 Cha. Ca. 65; *Payton* v. *Humphreys*, cited Ib.

(*l*) *Whitmore* v. *Thornton*, ubi supra.

after the trial, with proper and apt charges, a bill might have been filed in this court to compel the production of these documents, to which a demurrer would not have been allowed." "Considering," he added, "the mutual obligations of landlord and tenant, this is a different case, and a bill might have been sustained in this court for relief and for discovery. Then, it is said, that pending the application for a new trial, no one could have advised the defendant at law to file a bill. Now, in my opinion, the attempt to obtain a new trial, after being foiled in compelling the production of these documents, which he believed to be necessary evidence, was a reason for filing a bill; and I think there was negligence in this respect, though I am far from imputing blame to any one (*m*)." In this case the defendant undertook to produce the documents on oath at the trial, and the motion was dismissed.

Section 3.

Of Discovery after Judgment, in aid of Execution.

There are some early cases which appear opposed to the rule which has been stated in the preceding sections, that a discovery will only be given to be

(*m*) *Field* v. *Beaumont*, 1 Swans. 209. With regard to bills for relief after trial, see Ld. Red. Tr. 131, and cases cited. *Protheroe* v. *Forman*, 2 Swans. 227; *Lord Portsmouth* v. *Lord Effingham*, 1 Ves. 435.

used as evidence at a trial. "Where certainty wanteth, the common law faileth, but yet help is to be found in chancery for it; for if the queen grant to me the goods of A., who is attainted of felony, and I know not the certainty of them, yet shall I compel any man to whose possession any of them are come, to make inventory of them here (*n*)." The demurrer of an outlaw to a bill for the discovery of his real and personal estate was overruled; for it was held that the protector was entitled to the estate by course of law, and that a common person may have discovery to enable him to take out execution (*o*). The cases which are cited in support of a jurisdiction of this nature seem to be chiefly bills for relief, raising a different and substantive equity. In a case before Lord Eldon, however, where the plaintiff had sued out *elegits*, and brought his bill for a discovery of freehold estates, the general right of the creditor to a discovery, in order to make his judgment available, was admitted by the counsel for the defendant; and Lord Eldon, who observes, that in point of principle the case was equal in importance to any that had ever come before the court, yet seems to proceed on the defendant's admission (*p*). The ground of discovery is obviously an exception to the general principles upon which the court proceeds.

(*n*) Cary, R. 21. See Reeves' Hist. Eng. Law, vol. 3, p. 382, vol. 4, p. 368.

(*o*) *Protector* v. *Lord Lumley*, Hard. 22.

(*p*) *Mountford* v. *Taylor*, 6 Ves. 788; *Smithier* v. *Lewis*, 1 Vern. 398; *Angell* v. *Draper*, Id. 399; 2 Fonbl. Tr. Eq. 484.

Where a plaintiff brought an action in this country upon a judgment which he had obtained in a foreign court, it was held, on the ground that the foreign judgment could not be questioned here, that the defendant was not entitled to a discovery in aid of his defence (*q*).

Section 4.

Of the Proceedings in aid of which Discovery is given.

A discovery will only be given in aid of proceedings which relate to civil rights. "A bill of discovery," said Lord Hardwicke, "lies here in aid of some proceedings in this court in order to deliver the party from the necessity of procuring evidence, or to aid the proceeding in some suit relating to a civil right in a court of common law, as an action; but not to aid the prosecution of an indictment or an information, or to aid the defence to it. It is said this is a mandamus to compel the holding of a court; but this court has nothing to do to aid the discovery upon that (*r*)."

It is no objection to a bill for discovery that the matter in question might have been the subject of an indictment or information. An action for damages having been brought against the author of a libel, a bill was filed for the discovery of evidence in sup-

(*q*) *Martin* v. *Nicolls*, 3 Sim. 458.

(*r*) *Lord Montague* v. *Dudman*, 2 Ves. 398; *Cartwright* v. *Green*, 8 Ves. 405; 14 Ves. 64.

port of a plea of justification. It was objected that the bill admitted the authorship of the libel; that, whether true or false, it was an indictable offence; and the plaintiff, therefore, by his own shewing, came to this court to protect himself against the consequences of his crime. But, it was held, that, if the plaintiff at law thought fit to treat the conduct of the defendant as a civil injury only, it was but just that the same course of defence should be open to him which was open to other defendants in civil suits. It is no objection that the action proceeds *ex delicto.* "No such limitation of the jurisdiction as to discovery is hinted at in any book of practice, or by the *dictum* of any judge. Courts of equity exercise a direct jurisdiction in matters of waste and public nuisance, which are *ex delicto;* I am not therefore prepared to say, that a court of equity will refuse its ordinary aid to the parties in any action at law proceeding for a civil remedy (*s*)." The same principle was affirmed by Lord Eldon (*t*). The court could only consider it as an *alleged* libel (*u*), and whatever might be the nature or character of such an alleged libel, the court must assist a plea of

(*s*) *Per* Sir J. Leach, *Thorpe* v. *Macauley*, 5 Madd. 230; *Wilmot* v. *Maccabe*, 4 Sim. 263; *Nicol* v. *Verelst*, 4 Bro. P. C. Tom. ed. 416. In *Cojamaul* v. *Verelst*, Id. 407, the discovery was given, but the orders for the injunction to stay trial and the commission abroad, which had been made in the Exchequer, were reversed in the House of Lords. The defendant at law had pleaded not guilty, but had put in no plea of justification.

(*t*) *Macauley* v. *Shakel*, 1 Bligh, N. S. 96.

(*u*) Id. 127.

justification (*v*). It was observed by Lord Eldon, that, in the Exchequer, it was the practice with underwriters, when policies of insurance were found to be affected with gross frauds, to bring the assured into court and compel them to answer, by pleading frauds which would have been indictable (*w*). The discovery cannot be averted by exculpatory affidavits. "There is no man," said Lord Eldon, "who does not know, that, to answer a great many questions put to him, is not quite so easy an operation as to make an affidavit, stating what he is pleased to state, without having any questions asked of him (*x*)."

It is no objection that the discovery be sought in aid of actions which sound in *tort* (*y*). Bills seeking evidence to sustain or defend actions of trespass or trover have been brought (*z*). And, generally, there seems to be no civil right the trial of which will not be aided by this jurisdiction (*a*).

A discovery will not be given in aid of an action which is contrary to public policy (*b*), or upon a

(*v*) *Macauley* v. *Shakel*, 1 Bligh, N. S. 128.

(*w*) Id. 121.

(*x*) Id. 132. See 2 Russ. 551.

(*y*) *E. I. Comp.* v. *Evans*, 1 Vern. 307.

(*z*) Id. 308; 3 Ves. & B. 18; *Sloan* v. *Heatfield*, Bunb. 18; *Taylor* v. *Crompton*, Bunb. 95; *Marten* v. *Hampton*, Choyce Ca. Cha. 123.

(*a*) See *Vaughan* v. *Aldridge*, Forrest, Ex. R. 42; bill for discovery of a promise of marriage, in aid of *assumpsit*. *Young* v. *Burrell*, Cary, 55.

(*b*) *King* v. *Burr*, 3 Mer. 693. No assistance in prejudice of the King's charter; *Brooks* v. *Bradley*, 2 Cha. Ca. 95.

contract which is immoral (*c*). But where the bill is merely for discovery, it may perhaps be doubtful how far any objection on these grounds could be sustained, if they did not also constitute an objection at law; and in that case the defence rests upon a principle which has been considered elsewhere (*d*).

Section 5.

Of the Courts in aid of which Discovery is given.

The jurisdiction of equity in compelling a discovery is exercised "to assist the administration of justice in the court itself or in some other court (*e*)." If the suit in aid of which the discovery is sought be depending in the court itself, the jurisdiction in that case is already affirmed. If it be not previously depending, and the bill prays relief, it falls within the rule mentioned in a former chapter (*f*). It therefore only remains to consider the cases where discovery is sought in aid of a trial in some court other than the court of equity.

The authorities with regard to this subject are very few. If the court in which the trial is to be had can itself compel the discovery required, equity, it is said, will not interfere (*g*). On this ground, a

(*c*) *Franco* v. *Bolton*, 3 Ves. 368.
(*d*) Part II. Chap. I. p. 41.
(*e*) Ld. Red. Tr. 186.
(*f*) Part I. Chap. I. Sects. 3, 4, pp. 6, 11.
(*g*) Ld. Red. Tr. 186.

discovery to be used in the ecclesiastical court has been denied (*h*).

It has been said that discovery will not be given in aid of inferior courts (*i*); nor will the court of equity be made, in this manner, ancillary to the determinations of arbitrators (*k*).

As the defendant could not be compelled to answer upon oath before the King in council, it has been held that discovery should be given in aid of that jurisdiction (*l*). It has also been given to aid the jurisdiction of a foreign court (*m*).

If an issue be directed by the court of equity, or upon a petition in bankruptcy, it seems that a bill of discovery cannot be filed by either party in aid of that trial (*n*). If an action be permitted, and a full production ordered on both sides, it would appear that the rule is the same (*o*). If directions of this nature are not given, there seems to be no obstacle to a bill of discovery. In the two last cases, however, the question must be mainly, if not wholly, dependent upon the particular terms of the order or decree (*p*).

(*h*) *Dunn* v. *Coates*, 1 Atk. 288; 1 Ves. 205; *Anon.* 2 Ves. 451; *Cawston* v. *Helwyes*, R. t. Fin. 218. See *Gawnee* v. *Grandee*, Holt, 49.

(*i*) 1 Ves. 205; Ld. Red. Tr. 53.

(*k*) *Wellington* v. *M'Intosh*, 2 Atk. 569; *Street* v. *Rigby*, 6 Ves. 821.

(*l*) *Earl of Derby* v. *Duke of Athol*, 1 Ves. 205; Ld. Red. Tr. 225.

(*m*) *Crowe* v. *Del Ris and Vallego*, 1769, cited Ld. Red. Tr. 186, n. (*q*).

(*n*) *Cooke* v. *Marsh*, 18 Ves. 209.

(*o*) S. C.

(*p*) *Guppy* v. *Few*, cited *infra*, p. 126.

CHAPTER VI.

OF OBJECTIONS TO THE PERSON OF THE PLAINTIFF IN A BILL OF DISCOVERY.

"IF a plaintiff is not entitled to sue by reason of any personal disability, which is apparent on the bill, the defendant may demur. Therefore, if an infant or a married woman, an idiot or a lunatic, exhibiting a bill, appear upon the face of it to be thus incapable of instituting a suit alone, and no next friend or committee is named in the bill, the defendant may demur; but if the incapacity does not appear upon the face of the bill, the defendant must take advantage of it by plea. This objection extends to the whole bill, and advantage may be taken of it as well in the case of a bill for discovery merely, as in the case of a bill for relief. For the defendant in a bill for discovery merely, being always entitled to costs, after a full answer, as a matter of course, would be materially injured by being compelled to answer a bill exhibited by persons whose property is not in their own disposal, and who are therefore incapable of paying the costs (*a*)." A defendant, it is said, may "plead that the plaintiff is outlawed, excommuni-

(*a*) Ld. Red. Tr. 153.

cated, attainted, or an alien enemy (*b*)," thereby traversing the right of the plaintiff to call for a discovery.

If the plaintiff in the bill of discovery be the plaintiff at law, where the trial is to be had, it is presumed that the question would always be, whether the action could be maintained by him; for if that were the case, there does not seem to be any principle in equity upon which the assistance of the court would be withheld. If, owing to a personal disability, the plaintiff could not prosecute his action at law, the plea in abatement, by which he would be met there, must constitute a good plea in equity, upon the principle which has been stated in a preceding page (*c*). The discovery would be merely nugatory.

If, however, the plea be that of *alien enemy*, although the discovery would be nugatory with reference to the courts of justice in these dominions, there is yet another objection. The discovery might be used as evidence in foreign courts, within the jurisdiction of which British subjects may have property, and the principle which excludes the King's enemies from the benefit of his courts would be thus overcome (*d*).

If the plaintiff in equity be the defendant at law, and he seek a discovery in aid of his defence, there do not seem to be any cases in which a plea merely

(*b*) Beames' El. Pl. 254. p. 47.
(*c*) Part II. Chap. I. Sect. 4, (*d*) Coop. Tr. Pl. 191, 293.

to the person of such a plaintiff could be a defence to discovery.

It has been decided in the Exchequer, that the plea of *alien enemy* would not hold in such a case, upon the principle, that, if an alien may be sued at law, as he would be allowed process to compel the attendance of his witnesses, so he should have a discovery for the same purpose (*e*). This reasoning seems to proceed upon a just view of the nature of a bill of discovery, and is in conformity with several decisions in which the court has held defendants entitled to discovery in aid of their defence, to whom no assistance might have been afforded if they had appeared in the character of plaintiffs, seeking to sustain a suit or action (*f*).

(*e*) *Albretcht* v. *Sussman*, 2 Ves. & B. 326—328; Ld. Red. Tr. 229, and cases cited.

(*f*) *Daubigny* v. *Davallon*, 2 Anst. 462; *Lowndes* v. *Taylor*, 1 Madd. 423.

CHAPTER VII.

OF PARTIES TO BILLS OF DISCOVERY.

A DEMURRER to a bill for discovery merely will not hold for want of parties, for the plaintiff seeks no decree (*a*).

A bill, in a recent case, complained of the infringement of a patent, and liberty was given to bring an action to try its validity. The plaintiff, in the action which was brought for this purpose, was a trustee, to whom the property in the patent had been assigned. The defendants filed a bill against the trustee, who was the plaintiff at law, for a discovery and production of papers in aid of their defence. The plaintiff answered the bill, but resisted a motion which was made before the vice-chancellor for the production of certain documents referred to in the schedule. The vice-chancellor was of opinion, that, as the motion was in reality against the *cestui que trusts*, the production could not be directed unless they were parties. The order was therefore limited to the documents which the defendant in equity consented to produce. The motion was sub-

(*a*) Ld. Red. Tr. 200, 280; *Sangosa* v. *E. I. Company*, 2 Eq. Ca. Ab. 170.

sequently made before the lord chancellor; and, to obviate objection on the ground of parties, was intituled in both causes: the *cestui que trusts* being plaintiffs in the original bill. The question was argued at great length, and Lord Lyndhurst held, that, with regard to the motion, the parties stood in the situation they would have occupied if the original suit had not existed. The action had been brought by the trustee having the legal title, with the concurrence of the parties beneficially interested, and for their benefit. It was not possible that the *cestui que trusts* could be plaintiffs in the action, nor was it possible that they could be made defendants to the bill of discovery; for the bill of discovery in aid of the defence could be filed against none other than the plaintiff in the action. The trustee, in this case, was under the same obligation to produce the documentary evidence sought, as if he possessed both the legal estate and the beneficial interest. And his lordship directed the production of all the documents which related to questions appearing upon the bill of discovery to be at issue in the action, and which were not brought within some express ground of exception. "On the question of form," his lordship concluded, "I am of opinion that it would be more methodical to have intituled the motion in the discovery suit only, but I do not think that the objection can be insisted upon. I am aware that my opinion in this case is directly at variance with that of the vice-chancellor, for whose authority I entertain the highest respect. I cannot, however,

but consider that, where a plaintiff in equity has liberty to bring an action, and an action is brought, and a bill of discovery filed to which no objection is in the first instance made, the parties then stand in the same situation they would have held if the original suit had no existence (*b*)."

There may be many cases in which a party who appears by his answer to be a trustee in respect of the documents in question would not be ordered to produce them unless the *cestui que trust* were before the court; but these are upon bills for relief, and are dependent upon different principles (*c*).

Where a bill of discovery was met by a plea, and a case was directed to try the question raised by the plea, a motion, in the mean time, to amend the bill by adding other parties as plaintiffs, was refused. "With regard to the question of form," said Lord Eldon, "I would ask whether any authority can be produced in which the court has allowed a bill of discovery to be amended by adding parties as plaintiffs? I will not make a precedent for which there is no foundation in the principles or practice of the court (*d*)." It is observable that in this case there was no demurrer for want of parties. The shape which the objection assumed was a denial of the plaintiff's legal title, and therefore of his right to

(*b*) *Guppy* v. *Few*, *Few* v. *Guppy*, Linc. Inn Hall, 27th Feb., 4th, 5th, and 18th March, 1835, MS.

(*c*) *Lambert* v. *Rogers*, 2 Mer. 489.

(*d*) *Cholmondeley* v. *Clinton*, 2 Mer. 74.

maintain the ejectment, to which the discovery was proposed to be assistant (*e*).

In concluding the Second Part, it may be useful to advert to the material distinctions which exist between the grounds of defence to discovery, of which it treats, and those which are the subject of the Third Part.

The protection from discovery, which is founded upon the foregoing principles, is necessarily a defence to the entire bill. If it be insisted that the plaintiff has no title to sue,—that the defendant possesses no interest,—that he is a *bonâ fide* purchaser,—or that the answer is not required for any judicial purpose which the court will aid,—it is clear that the defect, upon which the objection is founded, must pervade the entire suit. None of these grounds of defence is, in its nature, susceptible of a divided application. If the objection take the form of a demurrer, it is a demurrer to the whole bill. If it be raised by plea, it must be pleaded *ante litem contestatam*, for it asserts a reason why an answer should not be given (*f*).

The objections to discovery, which it is the business of the next Part to examine, are opposed to the last kind in each of these particulars. If it be insisted, that the discovery of a certain matter might

(*e*) Part II. Chap. I. Sect. 3, p. 46.

(*f*) Ld. Red. Tr. 211; 2 Sugd. V. & P. 303.

subject a defendant to penalties,—that it would be immaterial,—that it involves a breach of confidence, —or that it relates to the defendant's title exclusively,—it is evident that these objections do not, of necessity, extend to the entire suit. They cannot, in fact, furnish any defence to the relief, if relief be prayed (*g*); for they are objections which apply to discovery, and to discovery alone. They are, in their nature, capable of a partial application. They may extend to one interrogatory in the bill without affecting another. Hence, also, the same contrariety in form. The objection may be taken by demurrer or plea, and it is not inconsistent with an answer to other allegations in the bill.

There are some cases where these grounds of defence, so distinct from each other in principle, have, in practice, a great degree of similarity. If the defendant deny the title of the plaintiff, he may yet be required to accompany his plea with an answer to some allegations relating to the evidence of that title. If, on the other hand, he plead that an answer to the bill might subject him to certain penalties, the plea may possibly cover every interrogatory in the bill. In these contrasted cases, the plea to the entire suit is accompanied by a discovery, and the plea of the partial or limited kind protects the defendant from all discovery.

It is apparent, however, that the relative extent of these pleas is a merely accidental circumstance.

(*g*) Ld. Red. Tr. 196; Beames' El. Pl. 263; 2 Ves. 246.

It neither confounds the essential distinction between them, nor diminishes its importance. The former ground of defence necessarily extends to the relief, or offers a bar to all further proceeding. The latter ground can in no circumstances extend to the relief, or constitute a bar to the proceeding. It merely objects, that, for certain specified reasons, the defendant ought not to be compelled to make a discovery. And it seems to be a necessary result, that, where the bill is met by a valid plea of the first kind, it rests upon the plaintiff to entitle himself to discovery, which he can only do by introducing some special charges inconsistent with the plea (*h*); and where the defence is of the class about to be examined, the plaintiff is entitled to a full answer, and the burthen lies upon the defendant to protect himself from discovery by bringing the particular matter within one of the principles of exemption discussed in the following Part.

A further distinction of great practical moment will be found to arise from the nature of the several objections to discovery, in the application of the rule, that a defendant who submits to answer, must answer fully (*i*). That rule applies imperatively to all cases falling within the Second Part of the present treatise. It does not, however, apply generally to cases which are within the Third Part. The effect of the rule with regard to the latter cases will properly be considered in that Part which relates to

(*h*) Part I. Chap. II. Sect. 5, p. 36. (*i*) Part IV.

the form in which the various grounds of defence to discovery must be insisted upon.

It needs only to be added, with respect to the suits to which these objections are respectively applicable, that, whilst those which are considered in the Second Part are limited to the cases which have been specified under each head of defence, the objections to answer, which are examined in the Third Part, may be taken in the same form, and have the like operation in all suits, whether the bill seek relief or discovery merely.

PART III.

CHAPTER I.

OF DISCOVERY WHICH MIGHT SUBJECT THE DEFENDANT TO PENALTY OR FORFEITURE.

SECTION 1.

Of the General Rule.

IF the answer of the defendant might be evidence tending to subject him to punishment by any judicial or competent authority, or to any penalty or forfeiture, or disability in the nature of a penalty, the defendant will not be compelled to make the discovery.

It is, said Lord Hardwicke, a general rule, established with great justice and tenderness by the law of England, that none shall be obliged to discover what may tend to subject him to a penalty, or to that which is in the nature of a penalty (*a*). Equity will not interfere against this rule, and the cases are nu-

(*a*) 2 Ves. 394. See 2 Swans. Tr. 193, 284; Beames' El. Pl. 214, per Lord Eldon; 1 Phill. 259; 3 Bl. Com. 100. Tr. Evidence, 276; Ld. Red.

merous in which the principle has been appealed to by defendants (*b*).

It was formerly said, that if a discovery might tend to render a party infamous, he should not be obliged to answer (*c*); but it has been held by Lord Eldon, that if a defendant be not liable to any penalty or forfeiture, he is bound to answer fully, notwithstanding his answer may tend to cast a very great degree of reflection upon his character and conduct (*d*).

If the penalty be pecuniary, and attach upon a

(*b*) Penalties by Common or Statute Law—*Lady Mountague's Case*, Cary, 9; Id. 12, 13; *Guiborn* v. *Fellows*, 8 Vin. Ab. 543, pl. 6; *Attorney-General* v. *Reynolds*, 1 Eq. Ca. Ab. 131; *Blackwood's Case*, Hardr. 139; 3 P. Wms. 376; *Bird* v. *Hardwicke*, 1 Vern. 109; 2 Atk. 389; 1 Ves. 247; 1 Atk. 52; Id. 450; Mos. 75; 1 Bro. C. C. 96; *Wallis* v. *Duke of Portland*, 3 Ves. 501; S. C. 8 Bro. P. C. 161; 5 Ves. 173; 14 Ves. 65; *Lloyd* v. *Passingham*, 16 Ves. 60; Id. 239; 19 Ves. 225; 1 Anst. 82; Id. 160; *Cowan* v. *Phillips*, 3 Anst. 843, 902; *Selby* v. *Crew*, 2 Anst. 504; 1 Mer. 391; *Fleming* v. *St. John*, 2 Sim. 181; 1 Sim. 426; *Nelme* v. *Newton*, 2 Y. & J. 186, n. (b). Ecclesiastical Punishments—2 Ves. 245; Id. 451; Id. 493; 3 Ves. 371. Parliamentary Incapacities—Mos. 80, 124; *Honeywood* v. *Selwin*, 3 Atk. 276. Disability in the nature of a Penalty—1 Atk. 526; S. C. 8 Vin. Ab. Discov. B. pl. 21; 2 Ves. 395; S. C. 1 Atk. 539; 2 Eq. Ca. Ab. 77. Forfeiture of Interest—*Fane* v. *Atlee*, 1 Eq. Ca. Ab. 77; *Lord Uxbridge* v. *Staveland*, 2 Ves. 56; *Harrison* v. *Southcote*, 2 Ves. 390; 2 Ves. 265; 1 Atk. 526; 2 Atk. 392; 3 Atk. 453; *Attorney-General* v. *Vincent*, Comyn, 664. Penalty upon Contract—*Bishop* v. *Bishop*, 1 Rep. in Cha. 76; *Wolgrove* v. *Coe*, Tot. 80. The cases which are not named in this note are those which are cited in other parts of the present chapter.

(*c*) *E. I. Company* v. *Campbell*, 1 Ves. 247.

(*d*) *Parkhurst* v. *Lowten*, 1 Mer. 400.

fund of which the defendant is merely a trustee, though it be not the consequence of his own act, whereby he will be personally liable to any loss, yet he may, and it seems, is bound, to take the objection; for a trustee has as much the benefit of the pleading in this court, as he who possesses the beneficial interest, and the *cestui que trust* is entitled to have the privilege maintained (*e*).

The objection to answer which is within this rule must be distinguished from that which results from the principle, that it is only in the prosecution of a civil right, or in the defence of a civil action, that equity will assume jurisdiction to compel a discovery (*f*). The present rule is only applicable where there is no general objection to the whole bill or proceeding, and where it is simply contended that there are questions which the court will not require to be answered. It is not a foundation for a general demurrer (*g*). The demurrer or plea may cover part of the discovery, and it may even apply to every interrogatory, so that no discovery will be compelled. In such a case, if the bill be for discovery only (*h*), it resembles, in effect, a general demurrer; but its extent is a mere accident, that cannot change the nature of the defence. The de-

(*e*) *Earl of Suffolk* v. *Green*, 1 Atk. 450. See *Parkhurst* v. *Lowten*, 1 Mer. 397.

(*f*) Part II. Chap. V. Sect. 4, p. 116.

(*g*) *Whittington* v. *Burgoyne*, 3 Ans. 900; *Gibbons* v. *Waterloo Bridge Comp.* 5 Price, 491; 1 Swans. 286, 294; Beames' El. Pl. 263.

(*h*) *Macallum* v. *Turton*, 2 Y. & J. 183.

fendant, in order to protect himself, must shew that every question individually is liable to the objection upon which he insists (*i*).

The distinction is illustrated by the case of a bill of discovery, charging the defendants with having converted to their own use a sum of money which they found secreted in a bureau, delivered to them for the purpose of repair: they demurred, and the demurrer was framed and argued upon the ground, that the discovery sought might subject them to criminal punishment; but Lord Eldon, in his judgment, expressly places it upon the ground of jurisdiction; reducing it to the simple question, whether the offence was a felony, and upon that construction holding, that the policy of the law required that the court should not give the discovery. There the objection to the interrogatories is not founded upon their tendency to criminate, or their connection with others which have that tendency, but it is that they relate to a proceeding, in aid of which the court will not be made subservient (*k*).

There are some cases which may be properly described as exceptions to the rule, and others that would be inaccurately so termed, but are rather cases in which it has been held to be inapplicable. The exceptions comprehend the instances in which, by some provision of the legislature, or by some act

(*i*) *Claridge* v. *Hoare*, 14 Ves. 65. The bill in this case was for relief; the plea was only to the discovery. See Beames' El. Pl. 339.

(*k*) *Cartwright* v. *Green*, 8 Ves. 408.

of the plaintiff, or of the defendant himself, the power of insisting upon the objection is taken away. The cases in which the rule has been determined to have no operation are of two kinds:—where the liability which the defendant incurs, though in effect it may resemble a penalty or forfeiture, is not construed to be strictly penal; and where the penalty, which at one time attached in respect of the matter in question, has ceased to attend it.

Section 2.

Of the Exception by Statute.

The legislature has in some cases expressly provided, that the parties to transactions illegal by statute shall be compellable to answer bills in equity for discovery of such transactions (*l*).

The act to prevent stock jobbing (*m*) gives an action of debt, with double costs, to recover money paid upon the illegal contracts mentioned in its first section, and enacts, that all persons liable to be sued for such recovery shall be compellable to answer, upon oath, such bill as shall be preferred, in any court of equity, for discovering the contract, and the sum so paid (*n*). There is a penalty imposed upon

(*l*) Ld. Red. Tr. 287; 12 Ann. c. 14; *Smith* v. *Read*, 1 Atk. 527; 2 Ves. 391.

(*m*) 7 Geo. 2, c. 8.

(*n*) Sect. 2; *Bancroft* v. *Wentworth*, 3 Bro. C. C. 11, where this section was held to apply to a bill for relief.

persons making or executing such contracts, from which, however, the defendant who shall have made a discovery in equity is exempted (*o*). Other penalties are affixed, by the fifth and eighth sections, to the compounding of differences, and to the sale of stock which the vendor does not possess; but no bill of discovery is given with respect to these clauses; and with regard to transactions which they prohibit, a discovery will not be compelled (*p*). The only objection to answer, which the second section renders unavailing, is that which arises from the liability to double costs in the action of debt.

The statute of 9th Anne (*q*), for the prevention of gaming, gives the power of compelling a discovery of money won at play, and takes away the penalty as against a party who shall make discovery and repayment (*r*). It has been held, that this statute does not extend to compel a discovery in aid of an action by the common informer, but only in aid of the party by whom the money was lost. The loser of money won at play, it was said, might be, and generally is, without witnesses of the fact to support the action, which would therefore be given idly and in vain; and even before the statute, equity would have compelled a discovery on his behalf. The common informer, on the contrary, might call the loser himself as a witness. Adverting to the right of protection from discovery, Alexander, C. B., added,

(*o*) Sect. 4.

(*p*) *Bullock* v. *Harrison*, 11 Ves. 374; *Billing* v. *Flight*, 1 Madd. 235.

(*q*) Cap. 14, s. 3.

(*r*) S. 4.

whenever that right shall be taken away from the subject, " it must be done expressly, by a clear and unequivocal enactment (*s*)."

Considered as an exception to the general rule, it appears, therefore, that these statutes have little operation. Very few, if any, other statutes will probably be found abridging the right of being protected from self accusation, which pervades every part of our system of judicial inquiry (*t*).

The construction of the bankrupt act has been disputed, where the bankrupt has declined to answer interrogatories, on the ground that his answer might criminate him. This subject does not, however, belong to the present inquiry (*u*).

Section 3.

Of the Exception by the Waiver of the Plaintiff.

If a plaintiff be solely (*v*) entitled to take advantage of a penalty or forfeiture, and by the bill expressly waives that right, the objection to discovery on this ground is obviated (*w*), and the defendant

(*s*) *Orme* v. *Crockford*, 13 Pri. 376; *Holloway* v. *Goldsmid*, and other cases, cited Id. 384, 385; *Cowan* v. *Phillips*, 3 Anst. 843. See *Mynd* v. *Francis*, 1 Anst. 5; *Coward* v. *West*, Tot. 80.

(*t*) See 2 Ves. 391, where it is said, that there were many cases in Ireland; Bunb. 15, 21; Hardr. 141.

(*u*) See 6 Geo. 4, c. 16, ss. 34, 36, 112; 1 Mont. & Bl. 192, 203, 211.

(*v*) 3 Bro. C. C. 38; Mos. 75.

(*w*) *South Sea Comp.* v. *Bumstead*, Mos. 75; Ld. Red. Tr.

must answer. If the plaintiff should proceed at law for penalties, upon the discovery which he has thus obtained, his waiver would be ground for injunction (*x*), and he is of course bound by it in the suit in equity.

If the penalty were prescribed upon the nonpayment of money, as of rent on a given day, and the plaintiff should waive the penalty or forfeiture, he may perhaps be entitled to a larger relief, even after his waiver, than would be decreed in the absence of the penal stipulation. The plaintiff will still be entitled to compensation (*y*) for the breach against which the penalty was designed to guard, and in placing him in a situation the same as if the covenant were performed, the court may give interest upon interest (*z*), looking upon the penalty as still impending, but treating it as a security for affording to the plaintiff the full benefit of his contract. If not, it may be proper to introduce an exception in the waiver to meet the circumstances; and it is presumed that such a partial waiver would then be sufficient.

195, 287; *Brand* v. *Cumming*, 22 Vin. Ab. 315, pl. 4; *Mason* v. *Murray*, cited 3 Bro. C. C. 40.

(*x*) *Lord Uxbridge* v. *Staveland*, 1 Ves. 56; *Wools* v. *Walley*, 1 Anst. 100.

(*y*) 18 Ves. 59.

(*z*) 7 Ves. 273.

Section 4.

Of the Exception by the Acts of the Defendant.

There have been several decisions, where the East India, South Sea, and African companies, have been plaintiffs upon covenants by their servants, framed to prevent them from converting situations of confidence into sources of private and unauthorized emolument. In some instances the defendants had bound themselves to pay, or to permit the company to deduct, or retain in account (*a*), a specified sum, in case of a breach of the regulations of their service. Here it has been said, the defendant, by agreeing to allow the sum in account, has so made himself an accounting party, that equity will, on its ordinary principles, compel a discovery (*b*). In other cases of this description, the defendants have expressly covenanted to answer a bill of discovery (*c*). It has been insisted, that such a covenant could not restrain the defendants from resorting to that defence which the law allows to every subject. If a party, it was said, had covenanted to refer all disputes to arbitration, yet he might have been sued in Westminster Hall; if a mortgagor covenanted not to redeem, yet,

(*a*) *African Comp.* v. *Parish*, 2 Vern. 244; 1 Sim. 428; *E. I. Comp.* v. *Neave*, 5 Ves. 173.

(*b*) 2 Vern. 244; 5 Ves. 185; *E. I. Comp.* v. *Mainston*, 2 Cha. Ca. 218.

(*c*) *South Sea Comp.* v. *Bumstead*, Mos. 74; S. C. 1 Eq. Ca. Ab. 77; 1 Sim. 429; *E.I. Comp.* v. *Atkyns*, 1 Stra. 168; 1 Com. 347; 1 Sim. 428, 431; *E. I. Comp.* v. *Nash*, cited Mos. 77.

upon a bill filed in this court, a redemption would be decreed; if a tenant covenants, that, if his landlord shall distrain, he will not bring a replevin, yet he may replevy. And if parties are relieved against covenants which rob them of the liberty of suing in common with other subjects, much more shall they be relieved against those that deprive them of their legal defence in case they are sued by others (*d*). The court has, however, given effect to these covenants, and compelled the defendants to answer; but no plaintiff, other than the company with whom the contract was made, is entitled to the discovery upon it (*e*). It is also to be remarked, that the cases seem to be those of mere pecuniary (*f*), and not of corporal responsibility.

Without expressly covenanting to answer, the defendant may, by the effect of his acts, exclude himself from the benefit of the rule in equity (*g*). A court of equity, it is said, knows no difference between a mere moral obligation, and one resulting from stipulation by deed (*h*); and the obligation has been deemed to be of a higher kind, where the plaintiff trusted unreservedly to the character which the defendant assumed, than where he contemplated a breach of the contract, and provided for his damages in that event. The latter consideration may, how-

(*d*) *South Sea Comp.* v. *Bumstead*, Mos. 76.

(*e*) *Paxton* v. *Douglas*, 16 Ves. 241.

(*f*) 1 Sim. 430.

(*g*) *Green* v. *Weaver*, 1 Sim. 427; *Gascoyne* v. *Sidwell*, Gilb. Eq. Rep. 186; *Nash* v. *Ash*, 1 Eden, 378.

(*h*) 1 Sim. 432.

ever, be applicable to an engagement to indemnify, rather than to an obligation to disclose.

A broker of the city of London, charged with fraud, in giving fictitious names as those of the vendors of merchandize which he purchased for the plaintiff, and in making a secret profit beyond his brokerage, set forth the bond he had entered into, and the oath he had taken, to perform the duties of his office, of which the alleged transaction would be a breach, and he therefore objected to answer. The partners of the broker were also defendants, and they alleged that they had not been admitted as brokers, and relied on the penalties imposed by statute on persons so acting without due admission, as a ground of protection from discovery. Sir A. Hart, V. C., held that the defendants were bound to answer; for, if not, it might render these acts of parliament, especially framed for the purpose of protecting principals from the dishonesty of their agents, a cover to their agents in the grossest fraud; for, stript of the effect of the statutes, as inflicting penalties, it would be the common course of a court of equity to compel each of the defendants to state, on oath, whether they were employed as brokers and agents of the plaintiff, or whether they acted in that capacity, and to set forth every particular of each of the defendants' dealings as agent or broker of the plaintiff, and to produce every entry in his books, and every document relating to those transactions. If equity in this case protected them from the discovery, the proceeding at law must be quite nugatory,

for the materials of evidence must necessarily rest almost exclusively in their possession. A defendant may contract so as to incur the obligation to make the discovery of all the facts relative to that contract, although the effect of that discovery may incidentally subject him to pecuniary penalties. "If," the vice chancellor added, "a court of equity gives effect to a defence so constituted, I do not know that there can be any reason why an executor or administrator, who has made oath duly to administer the assets, and executed a bond for that purpose, may not allege those matters in answer to a bill of discovery, charging him with fraudulently tendering an account of the assets (*i*)."

Where the defendants have so acted that the plaintiff has an equitable case against them, or a case of which a court of equity will take cognizance or entertain jurisdiction, the defendants cannot insist upon the objection to discovery, that it may afford evidence upon an indictment for conspiracy.

The boundaries between matter which is indictable, and that which amounts to a fraud, are often very close (*k*). Where the bill was for a discovery of the property in goods, alleged to be liable to the alien dues, and entered by one of the defendants in the name of another, a natural-born subject, the defendants demurred, on the ground that it was in substance

(*i*) *Green* v. *Weaver*, 1 Sim. 430. See 1 Mer. 171.

(*k*) *Per* Lord Hardwicke, *Chetwynd* v. *Lindon*, 2 Ves. 451; 2 Ves. 391.

a charge of conspiracy; although the common charge of combination had been omitted; but Lord Eldon did not allow the demurrer on that ground (*l*). In a case which is stated elsewhere (*m*), the like objection was taken, and his lordship observed, "I am perfectly satisfied, that, by allowing the demurrer, I should destroy this jurisdiction, as without the ordinary words charging the parties with combination and confederacy, in nine cases out of ten, from all time past, they would upon modern doctrine be liable to indictment, yet courts of equity have been constantly compelling the discovery (*n*)."

Adverting to the practice in the Exchequer, Lord Eldon said, that "underwriters frequently brought the assured into that court to be relieved against their liability in respect of the assured's actions against them, by pleading frauds, which frauds would have been indictable (*o*)."

It is said that there have been cases in which a defence to discovery on the ground of conspiracy has been allowed (*p*); and it is clear that a charge of unlawful combination need not be answered (*q*).

(*l*) *Mayor, &c. of London* v. *Levy*, 8 Ves. 404.

(*m*) *Dummer* v. *Corporation of Chippenham*, *ante*, p. 85.

(*n*) 14 Ves. 251, 255. See *Chetwynd* v. *Lindon*, 2 Ves. 451.

(*o*) 1 Bligh, N. S. 122; 2 Ves. 451.

(*p*) *Bakewell* v. *Oliver*, Exch. *Mayor, &c. of London* v. *Ainslie*, cited 8 Ves. 401; S. C. 1 Anst. 160; *Oliver* v. *Haywood*, 1 Anst. 82. The objection seems to have been, that the imputed acts were *maintenance*.

(*q*) Ld. Red. Tr. 41.

Where, however, a party submits to be examined as to matters which are penal to him, equity will not interpose (*r*).

Section 5.

Of the Distinction between a Penalty and Stipulated Damages.

On this objection to discovery, it is sometimes important to distinguish whether the liability of the defendant is in the nature of a penalty (*s*), or of stipulated damages (*t*). If it be merely stipulated damages, the principle cannot apply (*u*). Cases may, perhaps, be found, which, upon the question of relief, have been held to fall within the latter class, where, if the point of discovery had been made, the court would not probably have compelled it (*v*), but these may be regarded as to a certain degree anomalous (*w*).

(*r*) See 1 Sim. 429.

(*s*) 2 Atk. 238; 3 Atk. 395, 555; 1 Bro. C. C. 418; 1 Cox, 26; 1 Ba. & Be. 374; 2 Bos. & Pul. 346.

(*t*) Cha. Ca. 183, 184; Fin. 117; 2 Vern. 119; 2 Atk. 194; 3 Atk. 396.

(*u*) *E. I. Comp.* v. *Neave*, 5 Ves. 183, 185; *E. I. Comp.* v. *Blake*, Rep. t. Finch. 121; *Jones* v. *Green*, 3 Y. & J. 289.

(*v*) *Roy* v. *Duke of Beaufort*, 2 Atk. 194. See 5 Ves. 182.

(*w*) See 5 Ves. 181.

Section 6.

Of the Distinction between the Forfeiture of an Interest and the Divesting of a Wrongful Possession.

If the bill seek a discovery of facts which would shew that the defendant never had an interest in the property which he wrongfully retains; or, having had an interest, that it has ceased by the taking effect of some limitation over; the defendant will not be permitted to set up the loss of possession which the proof of these facts would occasion, as a ground for withholding discovery.

In an old case in the exchequer, where a question arising upon this principle was elaborately argued, it was said that bills were common in that court to discover the prisage due upon imported wines, for these duties were not a penalty, but an inheritance of the crown (*x*); and that it had been usual, without objection, to prefer bills in the court of wards to discover tenures *in capite*, for this was only a reservation between lords and tenants, upon the distribution of lands and the original creation of tenures (*y*). Where commissions were issued under the great seal, to inquire whether the defendant and her daughter were aliens, and, if they were, then to seize the lands and rents of which they were devisees into his majesty's hands, the attorney-general exhibited an information in the exchequer, in the nature of an Eng-

(*x*) *Attorney-General* v. *Mico*, Hard. 138, 145. (*y*) Id. 139, 145.

lish bill, for discovery and production of deeds and papers. It was urged on behalf of the crown that alienage is no crime, and there could be no punishment where there is no guilt, no command neglected, or no prohibition broken: that there was neither right to be divested nor forfeiture, for the defendant took nothing originally but for the benefit of the crown. The defendant was therefore compelled to answer (*z*).

"There is a difference," said Lord Hardwicke, "where the disability arises from the rules of law, and where it is imposed as a penalty (*a*)." And the principle is adverted to by Lord Redesdale as applying to all cases where the discovery is sought of matter which would shew the defendant incapable of having any interest or title (*b*).

If the cessation of interest, upon the happening of the fact of which a discovery is sought, be considered as a conditional limitation, and not a forfeiture, the defendant must answer (*c*). This is the case where the limitation of an estate is during widowhood and then over (*d*). But if the terms of a bequest make a forfeiture of that which would be otherwise absolutely in the defendant, a discovery will not be compelled (*e*).

(*z*) *Attorney-General* v. *Duplessis*, 1 Bro. P. C. 420; 2 Ves. 287; Parker, 144. See, however, 2 Ves. 494; Beames' El. Pl. 267.

(*a*) *Smith* v. *Read*, 1 Atk. 527; 8 Vin. Ab. Discov. B. pl. 21, S. C. See 1 Ba. & Be. 373.

(*b*) Tr. 197.

(*c*) Ld. Red. Tr. 197.

(*d*) *Lucas* v. *Evans*, 3 Atk. 260; *Chauncey* v. *Tahourden*, 2 Atk. 393; *Chauncey* v. *Fenhoulet*, 2 Ves. 265; 3 Atk. 457.

(*e*) See Beames' El. Pl. 265, et seq.; 2 Ves. 265; 3 Atk.

It was argued, that a discovery of facts creating incapacities under the statutes against papists, and against pluralities, should be compelled, on the ground that the effect of the former ought not to be considered as a penalty, but as a limitation over in favour of a protestant heir (*f*); and that the acceptance of a living which vacated one previously held, is a mere determination of the estate in the former living (*g*); but Lord Hardwicke determined that these legislative provisions were of a penal nature, and a ground of defence to discovery (*h*).

Section 7.

Of Cases where the Penalty ceases to Attach to the Act in Question.

The penalty to which the defendant was at one time liable, if the charge were true, may have ceased to attach, and the objection is then removed. This may happen, either by lapse of the time during which the defendant is liable to suit or prosecution, or by the death of the party who was solely entitled to take advantage of the penalty.

If a party be liable to a penalty or forfeiture pro-

457; *Monnins* v. *Monnins*, 2 Cha. Rep. 68; *Wrottesley* v. *Bendish*, 3 P. Wms. 235.

(*f*) 3 Atk. 457.

(*g*) Id.

(*h*) *Boteler* v. *Allington*, 3 Atk. 457; *Jones* v. *Meredith*, Comyns R. 664; *Wynn* v. *Doughty*, 2 Eq. Ca. Ab. 77.

vided he is sued within a limited time, and the suit is not commenced until that time has expired, he is bound to answer (*i*).

The plaintiff is entitled to an answer if the period of liability ceases during the progress of the cause, after the defence to discovery has been put in, and before it is heard. Thus, where the defendant pleaded the statute giving penalties upon the acts with which he was charged, and the time of suing for the penalties expired before the hearing of the plea, the plea was overruled (*k*). And the same upon exceptions to an answer. Where the time of suing for penalties to the crown elapsed, after exceptions had been taken to the first answer, and before the second answer came in, the reason of the protection failed, and the discovery was given (*l*).

Where the penalty is personal, and does not survive, the objection cannot be taken after the death of the party who might have sued for the penalty. Therefore a bill by the executor of a parson, for an account of tithes subtracted, need not contain a waiver of the treble value (*m*).

(*i*) *Per* Lord Eldon, *Parkhurst* v. *Lowten*, 1 Mer. 400.

(*k*) *Corporation of Trinity House* v. *Burge*, 2 Sim. 411; and see cases at law, cited p. 414.

(*l*) *Williams* v. *Farringdon*, 3 Bro. C. C. 38; *Mason* v. *Murray*, cited Ib. 40.

(*m*) *Anon.* 1 Vern. 60; 1 Eag. 540; 8 Vin. Ab. 540, pl. 17; 11 Vin. Ab. 247, pl. 19, et seq.

SECTION 8.

Of the Objection, when it appears only by Plea or Answer.

When the objection appears upon the face of the bill it is a proper subject of demurrer, or the defendant may simply decline to answer the questions liable to it. The case is attended with greater difficulty where the plaintiff appears upon his bill to be entitled to discovery, but the defendant, by plea or answer, sets forth some new matter, and, connecting it with the facts alleged against him, thereby shews a liability to penalty, upon which he claims the protection of this principle.

The defendant may protect himself from answering, by suggesting a penal liability foreign to the statement of the bill, and to which it does not necessarily lead or has no obvious reference. If the bill states a marriage of the defendant with a particular woman, the defendant may plead matter to shew that such a marriage would have been incestuous, and he may refuse to state any thing more (*n*). So, to a bill for a discovery of deeds, which the defendant was alleged to hold under pretence of having contracted for the purchase of the estate, the defendant pleaded that the contract, if any, had been made after the supposed seller was out of possession, and

(*n*) *Brownsword* v. *Edwards*, 14 Ves. 65; Lord Red. Tr. 2 Ves. 245; *Claridge* v. *Hoare*, 284.

that the discovery tended to subject him to forfeiture, under the statute against selling or contracting for pretended titles (*o*).

Some observations, however, occur with regard to the consequences to which the principle may lead. Suppose a bill for an account of money received and paid by the defendant on behalf of the plaintiff, to which the latter pleads that his answer might subject him to penalties under some act, as, for instance, under the acts against bribery at elections. The plea may be merely an artifice to avoid discovery. The question then arises whether the jurisdiction of equity in compelling a discovery can be thus defeated.

It has been suggested that the supposed liability to penalties cannot be interposed against a discovery of that which is matter of account between the parties (*p*). "A party accountable cannot protect himself from an account in equity, by the mere suggestion that the duty of accounting is blended with duties of another kind (*q*)." The observations of Lord Eldon, which have given some countenance to this opinion, seem, however, to refer to the title of the plaintiff to relief by having the *account taken* in equity, merely asserting the jurisdiction of the court on the subject of the suit, without entering into the question how far the defendant must answer or the

(*o*) *Sharpe* v. *Carter*, 3 P. Wms. 375.

(*p*) See 5 Ves. 185; *Anon.* 2 Eq. Ca. Ab. 70, pl. 7; *Wilson* v. *Prince*, cited 2 Ves. 244. 303.

(*q*) *Per* Lord Eldon, 1 Swans.

plaintiff be left to such proof as he can make (*r*). The conclusion of Lord Eldon on the several occasions in which he examined the point, clearly seems to have been that it is an inflexible principle of our jurisprudence, that the defendant shall not be required to give any answer which may accuse himself (*s*).

It may be inferred from some decisions, that, where it is practicable, the court will not leave the plaintiff wholly unassisted in this difficulty. If the discovery withheld were of deeds, equity, it seems, would receive secondary evidence of their contents (*t*). Lord Eldon held, in bankruptcy, where a party was charged with the receipt of money upon the oath of the bankrupt, and refused to state the application of it, that the consequence was, that money was traced to him, and he could not prove that it had gone from him, and it therefore was necessarily to be considered as still in his hands (*u*). And in a case before Lord King, where the defendants to a cross bill refused to make a discovery, it was held that he could have no relief in the original suit (*v*).

It may be observed, that if a penal responsibility which has no foundation in fact be suggested in the

(*r*) 2 Ves. 493; 1 Swans. 294. See 8 Ves. 193.

(*s*) 2 Swans. 214.

(*t*) Id. 213.

(*u*) *Symes*, ex parte, 11 Ves. 521.

(*v*) *Wildbore* v. *Parker*, Mos. 124. See *Whitmore* v. *Francis*, 8 Price, 616; S. C. 2 Sim. 182, n. (*d*), discovery in aid of a defence at law refused.

plea, the ordinary course is open of putting the truth of the plea in issue by a replication (*w*). If the truth of a plea suggesting matter of criminal accusation were put in issue in equity, the court might happen to be led into a collateral inquiry with which it would be somewhat difficult to deal; and it might be necessary in such a case to establish some further principle relating to this jurisdiction, to which there has been hitherto no occasion to have recourse.

Section 9.

Of Questions Collateral to the Fact occasioning Penalty or Forfeiture.

The objection to a particular question may be, not that the answer to that interrogatory alone could lead to punishment, but that it is connected with other questions which altogether might have that effect; or, if their combined effect would be insufficient, still that it might form a link in the chain of evidence adduced *aliunde* to establish a liability to penalty.

When the facts are such as a defendant will not be compelled to answer, he cannot be required to answer the attendant circumstances, although they have not such an immediate tendency to criminate (*x*).

(*w*) See 2 Ves. 246, 247, *per* Lord Hardwicke.

(*x*) *E. I. Comp.* v. *Campbell*, 1 Ves. 247; *Paxton* v. *Douglas*,

It was laid down by Lord Eldon, that in no stage of the proceedings in this court can a party be compelled to answer any question accusing himself, or any one in a series of questions that has a tendency to that effect; the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer, containing nothing to affect him, except as it is one link in a chain of proof that is to affect him (*y*). "I have," he added, "looked into all the cases, and I find the distinctions between questions supposed to have a tendency to criminate, and questions to which it is supposed answers may be given, as having no connexion with the other questions, so very nice, that I can only say the strong inclination of my mind is, to protect the party against answering any question, not only that has a direct tendency to criminate him, but that forms one step towards it (*z*)."

Sir A. Hart, V. C., in commenting upon this passage, observes, that the true principle of a bill in equity is, that every statement of fact in every bill ought to be incidentally leading to the same conclusion as the prayer of the bill does lead to; for the

16 Ves. 242; *Claridge* v. *Hoare*, 14 Ves. 65; *Southall* v. ——, 1 Younge, 316; *Thorpe* v. *Macauley*, 5 Madd. 229; *Chambers* v. *Thompson*, cited Ld. Red. Tr. 198; 4 Bro. C. C. 434.

(*y*) *Paxton* v. *Douglas*, 19 Ves. 226.

(*z*) S. C. Ib. 227.

fact is either conducive to the general result, or it is unimportant and irrelevant. He considers Lord Eldon to have meant, not that every fact which may lead to the effect of subjecting a defendant to a penalty is objectionable, but where the whole *gist* and object of the suit is to convict a man in a penalty—where there would be no other purpose but to have relief in a court of equity on the footing of penalty—that as a court of equity does not relieve on penalty, it will not give any incidental discovery (*a*).

It is submitted, however, that if this explanation of Lord Eldon's meaning must be understood to import that the objection to answer questions not so directly leading to penal consequences, can only be raised when they relate to a subject upon which the court will not interfere, the cases are not consistent with the proposition. There are many authorities which establish the protection as to collateral questions, although the suit be strictly of equitable cognizance. And it has been remarked, that where the objection is to the jurisdiction, it is not properly referrable to the present ground of defence.

It would be useful, if it were possible, to adopt some leading rule, which would mark the extent to which this objection covers collateral questions, and serve as a guide in the application of the principle. This must, however, be a matter of great difficulty. The variations of circumstance are infinite, and there is no fact which may not, in some conceivable case,

(*a*) *Green* v. *Weaver*, 1 Sim. 430.

form an ingredient in the evidence of a crime (*b*). No distinguishing rule of this nature has been pronounced, and the reported cases do not afford materials from which any such rule can be collected. Some examples may, however, be extracted.

Where an action for damages was brought against the author of a libel, imputing to the plaintiff conduct amounting to a misdemeanour, and the defendant filed a bill for discovery in support of a plea of justification, a demurrer was allowed to the whole discovery sought; for, though many questions were not criminating, yet the sole object of the bill was to prove the truth of the criminal matter charged (*c*). And where a bill inquired whether a witness had not committed perjury by the defendant's procurement, and whether a verdict had not been obtained principally upon the evidence of that witness, Lord Hardwicke held, that the question as to the influence of the evidence was a part of the other question, and not distinct, and a demurrer to both questions was therefore proper (*d*).

On the other hand, where, to an interrogatory whether the defendant was tenant for life, he pleaded that it might subject him to a forfeiture, he having made a lease for the life of another, the plea was overruled by the same Judge. "Suppose," his

(*b*) See 8 Ves. 400.

(*c*) *Thorpe* v. *Macauley*, 5 Madd. 229. The demurrer was not allowed to extend to the whole object of the suit, but only to the discovery.

(*d*) *Baker* v. *Pritchard*, 2 Atk. 389. See *Southall* v. ——, 1 Younge, 312; *Symes*, ex parte, 11 Ves. 524.

lordship said, " a bill for discovery of waste, charging defendant to be tenant for life, and that he committed waste, and praying that he may set forth and discover whether he is not tenant for life; he may plead to the discovery whether he hath committed waste or not, but not whether he is tenant for life or not. The plaintiff will be entitled to have such discovery; he may plead to discovery of the act causing the forfeiture; but this is not a plea to that, but to discovery of the estate. There never was such a thing heard of: consider, how far it would go. Suppose tenant for life makes a conveyance in fee for valuable consideration, with covenant for further assurance, and there is a bill for that further assurance, or for satisfaction on the foot of that covenant—Can he plead that he is but tenant for life, and may forfeit his estate to another (*e*)?"

It was said by Lord Eldon, that if the questions proposed be, first, whether the party has received money; secondly, how it has been applied:—the first question, if connected with the other, has a tendency to bring him into that situation in which he may avail himself of the principle protecting him from a criminal prosecution (*f*).

(*e*) *Weaver* v. *Earl of Meath*, 2 Ves. 109. See *Finch* v. *Finch*, 2 Ves. 493.

(*f*) *Symes*, ex parte, 11 Ves. 524.

CHAPTER II.

OF THE OBJECTION THAT THE DISCOVERY IS IMMATERIAL.

SECTION 1.

Of the Definition of Immateriality.

SEVERAL classes of objections to answer are occasionally expressed in the books to be referrable to the principle of immateriality. The term has been sometimes used to describe the defence, which denies the interest of the plaintiff, and therefore the utility of the discovery (*a*).

In its most extended sense it may comprehend every case in which an answer, if it were given, would be inadmissible in evidence at the contemplated trial (*b*), or nugatory because there is no case to be tried (*c*). This, however, confounds the objection of immateriality with other grounds of defence. Convenience, sanctioned by authority and practice, assign to the subject of the present chapter a much narrower ex-

(*a*) Ld. Red. Tr. 193; 1 Bro. C. C. 96; 3 Bro. C. C. 155; 3 Ves. 498; 8 Bro. P. C. 161; 19 Ves. 84; 3 Pri. 492; 3 Sim. 479. See the Demurrer in *Wright* v. *Plumtree*, 3 Madd. 486, assigning *immateriality*, *ante*, p. 44.

(*b*) *Ante*, pp. 71, 81.

(*c*) *Ante*, pp. 43, 111, 122.

tent. In its present application, it must be considered as synonymous with *irrelevancy* (*d*).

There appears, however, to be a class of cases, which does not fall within this definition of immateriality, and where that ground of defence seems to be the foundation of a general demurrer. This occurs where, after the institution of an original suit in equity, some event happens which occasions an alteration in the interest of the parties, or some circumstance takes place of which a further discovery is necessary. In such a case a supplemental bill is proper (*e*). It is a valid ground of demurrer to such a bill that the new facts alleged are immaterial to the relief sought under the original bill (*f*). This defence arises out of the principles of pleading in equity, rather than from the doctrines of discovery. The adoption of the word *material* seemed, however, to call for some observations, pointing to this distinction.

Lord Redesdale observes, that if the discovery "can answer no purpose for which a court of equity ought to compel it, its immateriality may be used as a ground to protect the defendant from making it (*g*)." Another passage from the same treatise affords an example of the various signification which has been affixed to this term. "The discovery

(*d*) See 74th Order, April, 1828.

(*e*) *Usborne* v. *Baker*, 2 Madd. 379.

(*f*) *Adams* v. *Dowding*, 2 Madd. 53; *Milner* v. *Lord Harewood*, 17 Ves. 144; Ld. Red. Tr. 63, n. (*o*).

(*g*) Tr. 107.

sought," it is said, "must be material, either to the relief prayed by the bill, or to some other suit actually instituted or capable of being instituted. If, therefore, the plaintiff does not shew by his bill such a case as renders the discovery which he seeks material to the relief, if he prays relief; or does not shew a title to sue the defendant in some other court, or that he is actually involved in litigation with the defendant, or liable to be so, and does not also shew that the discovery which he prays is material to enable him to support or defend a suit; he shews no title to the discovery, and, consequently, a demurrer will hold (*h*)."

In determining the question of immateriality strictly so named, the propriety of the question must be tried by its applicability to the prayer of the bill; for, as the defendant has submitted to answer, it must be assumed that the subject is cognizable in equity, and that the bill is not liable to an objection by which any answer might be resisted.

An allegation may be immaterial in two points of view. It may not affect a particular defendant, and be therefore immaterial as to him; or it may not relate to the matter in question, and be therefore immaterial to the purpose of the suit.

(*h*) Ld. Red. Tr. 191.

Section 2.

Of Discovery which is Immaterial as regards the particular Defendant.

The discovery, though it may be of matters material to the cause, may yet be immaterial as it regards a particular defendant. Defendants in equity are frequently formal parties, and merely introduced for the purpose of bringing all persons before the court who have an interest in the subject in dispute; and, though in practice it is very common for each party to answer every part of the bill, it is often unnecessary. "A trustee or incumbrancer interested only in part, or heir-at-law, always answers to so much of the bill as applies to him, and need not answer the rest of it (*i*)." On a bill against arbitrators, Lord Northington said, "I do not say that arbitrators are to answer precisely as other defendants are, but yet they ought to answer material charges (*k*)." And though very little of definite authority appears in the books on this subject, it is unquestionably consistent with principle that a defendant should not be required to answer respecting the transactions of other persons on the record, when he is not charged with knowledge, interest, or participation (*l*).

In these cases it is perhaps rather the office of the

(*i*) *Per* Sir Thomas Plumer, V. C., Coop. 215.

(*k*) *Rybott* v. *Barrell*, 2 Eden, 134.

(*l*) See *Richardson* v. *Hulbert*, 1 Anst. 65; *Draper* v. *Jason*, Nels. 240. See 2 Russ. 458; *Williams* v. *Leighton*, Tot. Trans. 9.

bill to point out the charges which are applicable to the different defendants, and to interrogate them accordingly. It would often be a task of great difficulty and responsibility on the part of the defendant or his professional adviser, to select the portion of the bill which it is incumbent upon him to answer.

Section 3.

Of Discovery which is Immaterial to the Subject of the Suit.

To resist discovery on this ground, the charge must be so plainly immaterial, or, as Lord Thurlow expressed it, so obviously frivolous, that no state of the case can be supposed in which the answer could be made available (*m*). In general, if it can be supposed that the discovery may in any way be material to the plaintiff, the defendant will be compelled to make it (*n*).

The reported cases on this point are not numerous. Some instances may be collected in which the objection has been successfully raised. Thus, in a bill for redemption, the question whether the mortgagee was a trustee has been held to be immaterial (*o*). On a question relating to real estate, a

(*m*) *Bishop of London* v. *Fytche*, 1 Bro. C. C. 97. See 3 Price, 493.

(*n*) Ld. Red. Tr. 193; 2 Ves. 492.

(*o*) *Harvey* v. *Morris*, Nels. 214; Rep. t. Fin. 214, seems to be the same case as *Harvey*

discovery of proceedings had in the court of Delegates upon a grant of administration is immaterial (*p*). So, on a bill to establish an agreement for a separate maintenance, a demurrer was allowed to the discovery of several unkindnesses and hardships which it was alleged the defendant had used towards his wife to make her recede from the agreement (*q*). The case of a bill requiring an admission of assets, or that the defendant may set out an account, where the admission exempts the defendant from rendering the account, has been referred to the same principle (*r*).

v. *Clayton*, 27 Car. 2, cited 2 Swans. 221, n. (a), where the point is said to be, that the defendant was a scrivener.

(*p*) *Baker* v. *Pritchard*, 2 Atk. 387.

(*q*) *Hincks* v. *Nelthorpe*, 1 Vern. 204.

(*r*) *Agar* v. *Regent's Canal Comp.* Coop. 212; *Welsh* v. *Fish*, Mos. 38; *Lloyd* v. *Williams*, Rep. t. Fin. 397; *Turner* v. *Binion*, Hardr. 201; 11 Ves. 301; 1 Younge, 311; 1 Ves. & B. 504; 2 Ves. 399, n.

CHAPTER III.

OF THE DISCOVERY OF EVIDENCE IN THE KNOWLEDGE OR POSSESSION OF A DEFENDANT, OWING TO HIS SUSTAINING SOME CONFIDENTIAL OR PRIVILEGED CHARACTER.

SECTION 1.

Of the Distinction where the Discovery is sought from the Principal, and where from the Professional Agent.

THE privilege of secrecy which is afforded to matters coming to the knowledge of professional men, and to communications passing between them and their clients, is very different in degree, according as the discovery is sought from the client himself, or from the professional person. This distinction is very fully expressed in a recent judgment of Lord Brougham (*a*).

"We are here," said his lordship, "to consider, not the case which has frequently arisen in courts of equity, and more than once since I came into this court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so has, at different

(*a*) *Greenough* v. *Gaskell*, 1 Myl. & K. 100.

times, been a matter of controversy. And in two cases before Lord Lyndhurst, and once since I sat here, the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending, or with reference to that suit when in contemplation. But the party has no general privilege or protection; he is bound to disclose all he knows, believes, and thinks respecting his own case; and the authorities therefore are, that he must disclose also the cases he has laid before counsel for their opinion, unconnected with the suit itself. Here the question relates to the solicitor, who is called upon to produce the entries he had made in accounts, and letters received by him, and those written (chiefly to his town agent) by him, or by his direction, in his character or situation of confidential solicitor to the party; and I am of opinion that he cannot be compelled to disclose papers delivered, or communications made to him, or letters, or entries made by him in that capacity. To compel a party himself to answer upon oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, not being his professional advisers, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. To force from the party himself the production of communications made by him to professional men, seems inconsistent

with the possibility of an ignorant man safely resorting to professional advice, and can only be justified, if the authority of decided cases warrants it. But no authority sanctions the much wilder violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel, or attornies, or solicitors, to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of. As regards them, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employment, they receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers in any court of law or equity, either as party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and, it may be, the most important of all communications;—those made with a view of being prepared either for instituting or defending a suit, up to the instant that the process of

the court issued. If it were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defence against attacks which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications, the protection would be insufficient, if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and his liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. It would be most mischievous, said the learned Judges in the Common Pleas, 'if it could be doubted whether or not an attorney, consulted upon a man's title to an estate, was at liberty to divulge a flaw.'"

Section 2.

Of the Privilege of Professional Confidence where the Counsel or Solicitor is Defendant.

It has been seen that a party cannot be made a defendant to a bill for relief, unless some decree can be prayed against him (*b*). Where the bill is for dis-

(*b*) Part II. Chap. II. Sect. 2, p. 65.

covery in aid of an action or suit commenced or contemplated, he must have incurred a liability in respect to which the action will lie, or the suit can be supported (*c*). If it be for discovery in aid of a defence, he must be plaintiff in the original proceeding (*d*). The fact, that the bill can be supported against him, is conclusive that the imputed transactions are not restricted to mere professional duty. No principle can extend to protect him from answering to charges upon which he is sought to be affected in his non-professional capacity.

A defendant who is merely the professional agent may demur, or plead, or, when necessary, answer the allegations against him, and plead to the rest of the bill. He then denudes himself of the character of a party, and his evidence can only be obtained by calling him as a witness. The doctrine of discovery ceases to apply to his case, and if he be examined in the cause, it must be as a witness, and governed by the rules affecting witnesses.

Assuming that the counsel or solicitor is a proper party to the suit, the question is, wherein he differs from any other defendant in the extent to which he is bound to answer.

If, it was said in a late case, the solicitor or counsel be a party, and especially to a fraud,—that is, if he were acting for himself, though he might also be employed for another, he would not be protected from disclosing; for, in such a case, his knowledge

(*c*) Part II. Chap. I. p. 41. (*d*) *Ante*, p. 125.

would not be acquired solely by his being employed professionally (*e*). In a case before Lord Nottingham, the plaintiff claimed an annuity and arrears, and prayed to set aside a lease precedent, for security of portions already satisfied, whereof the defendant was assignee, and that he might discover satisfaction. The defendant pleaded, that he knew nothing of the satisfaction but as counsel, and he was decreed to answer (*f*). Here it is observable, that the court did not separate the knowledge of the transaction which the defendant possessed as counsel and as assignee; and in a recent instance, where the defendant combined in his own person the character of trustee and solicitor of the *cestui que trust*, and was defendant to a bill of discovery in aid of the defence to an action in which he was plaintiff, it was held, that he could not insist upon the circumstance of his being the solicitor as a ground for resisting the discovery prayed by the bill (*g*). In those cases there does not seem to be any distinction arising out of the professional character of the defendant.

It may however happen, that the defendant may not be able, owing to some difficulty of form, to meet the bill by demurrer or plea to the relief or

(*e*) *Greenough* v. *Gaskell*, 1 Myl. & K. 98, 103, *per* Lord Brougham. See *Rothwell* v. *King*, 26 Feb., 26 Car. 2, 1673-4, 2 Swans. 221, n. (a), citing Lord Nottingham's MSS.

(*f*) *Spencer* v. *Luttrell*, 19 Nov., 26 Car. 2, 1674, 2 Swans. 221, n. (a), citing Lord Nottingham's MSS. See also *Stanhope* v. *Roberts*, 2 Atk. 214; *Conway* v. *King*, M. R., July 9, 1835.

(*g*) *Guppy* v. *Few*, in Chan., 27 Feb. 4, 5, & 18 Mar. 1835, cited *ante*, p. 126.

discovery which is sought against him; or that he may take neither of these courses, but submit to answer generally; or that his demurrer or plea may extend to a portion of the bill only, and he might submit to answer some part of it. It is in such cases that this protection applies, and the defendant will not be compelled to disclose communications made to him in his professional character. To determine whether the matter in question is within this privilege, it is necessary to resort to the rules on the examination of witnesses. "The rules of evidence," said Lord Brougham, in his judgment on the case which has been cited, "are the same on both sides of the Hall: the right which a party has on this side to a discovery from a defendant of what was communicated to him in his professional capacity, and the right which a party on either side has to obtain such information from a witness, are one and the same. Nor do I believe that there will be found any difference of opinion upon the question in the different courts (*h*)." The law upon this subject forms an important chapter in all the books on evidence, and it is needless to recapitulate it here (*i*).

A solicitor was made a defendant, and charged with having, by his solicitations, and by misrepresenting the circumstances of his client, induced the plaintiff to join in a promissory note, upon which the defendant advanced money to release the client from

(*h*) 1 Myl. & K. 115. 1 Stark. Ev. 70, 2nd ed. See 1
(*i*) 1 Phill. Ev. 140, 7th ed.; Myl. & K. 103; 2 Swans. 204.

imprisonment for debt. The latter shortly afterwards became bankrupt, and the plaintiff prayed that the note might be delivered up to be cancelled. The bill stated a variety of facts tending to shew that the defendant must have known the situation of the party, for whom he was many years solicitor. The defendant admitted this knowledge, but denied that the note had been given at his instance or entreaty. He admitted that he had in his possession books containing entries and *memoranda*, and also papers and letters relating to the matters in question, but stated that such entries and *memoranda* were made, and such papers and letters were written or received by him in his capacity of confidential solicitor for his said client; and these it was held that he could not be compelled to disclose (*k*).

This privilege is said to extend also to the case of an arbitrator, who is made a defendant (*l*).

(*k*) *Greenough* v. *Gaskell*, 1 Myl. & K. 98. The leading authorities on the examination of professional men as witnesses are considered in the judgment of the lord chancellor. See *Legard* v. *Foot*, Rep. t. Fin. 82.

(*l*) Ld. Red. Tr. 288; Beames' El. Pl. 271; Cooper, Tr. 300; *Rybott* v. *Barrell*, 2 Eden, 134. As to discovery by a *steward*, see *Earl of Falmouth* v. *Moss*, 11 Price, 465. Deeds of a *mortgagor* in the hands of a mortgagee—*Lambert* v. *Rogers*, 2 Mer. 489.

SECTION 3.

Of Discovery and Production of Deeds by Professional Parties.

In some cases, where the bill seeks discovery and production of deeds, an attorney may be properly made a party, and an answer, at least to some extent, required from him. Generally, he would be an improper party, for the possession of the attorney is the possession of the client; but if he should withhold the deeds in his possession, and not deliver them to his client on his applying for them, it would be proper to make him a defendant (*m*). To a proceeding of this kind it is presumed that Lord Eldon adverts, where, refusing a motion that an attorney, who it would seem was merely a witness, might produce papers, he adds, that in this court another mode is open, if it be not the fault of the party (*n*).

The extent to which a defendant in such circumstances must answer seems to be exemplified, in a case where the defendant to a bill for the discovery of a deed charged to be in his custody, and of its contents, demurred, for that he was an attorney, and intrusted by his client with that and other deeds,

(*m*) *Fenwick* v. *Reed*, 1 Mer. 123, *ante*, p. 67.

(*n*) *Wright* v. *Mayer*, 6 Ves. 281. This is called in the report a bill of discovery, but it would seem to be for relief also. The parties had gone into evidence; for the lord chancellor adverts to the circumstance of the motion having been made after publication. This is not, however, important to the present point.

and ought not to discover the same, or any matters which came to his knowledge. He was ordered to answer whether there was such a deed, and where and to whom delivered, and when he last saw the same, and in whose custody, but not to produce or discover the dates or contents of it (*o*). This extends no farther than merely admitting the possession, or setting out a list of documents in a schedule, which is commonly done (*p*), and leaves the substantial objection to be decided upon when the plaintiff attempts to avail himself of the admission. The necessity of answering to this extent seems to have been ruled in another case, where the bill was for a discovery of deeds. The defendant pleaded that he knew nothing of them otherwise than as counsel, and that he had them not, and the court held that it was not sufficient to plead that he knew nothing but as counsel, without divesting himself of them, and disclosing to whom he had delivered them; for otherwise deeds having been played into the hands of a counsel might be suppressed, and the party injured left without remedy: the plea was therefore directed to stand for an answer, with liberty to except as to when and to whom he had delivered the deeds (*q*).

Where an attorney, or a person standing in a like situation (*r*), is made a party to a bill, seeking a

(*o*) *Kington* v. *Gale*, Rep. t. Fin. 259, 260.

(*p*) As in *Greenough* v. *Gaskell*, 1 Myl. & K. 99.

(*q*) *Stanhope* v. *Nott*, 2 Swans. 221, n. (a), citing Mr. Cox's MSS.; *Atterbury* v. *Hawkins*, 2 Cha. Ca. 242.

(*r*) As his representative—*Fenwick* v. *Reed*, 1 Mer. 114.

discovery and production of title deeds, it seems, that so far as concerns the possession of them, his admission of that possession is substantially the admission of the defendant his client, and will be so treated upon a motion to produce them (*s*).

In a case where the personal representative of a solicitor, in possession of papers relating to the question in dispute, was made a defendant, with a prayer against him for the delivery of the documents, and in his answer he said he was ready to produce them, as the court should direct, submitting whether, as the solicitor had been confidentially employed by the other defendant, he ought or not to set forth a list of such papers, or to leave the same in the hands of his clerk in court;—Lord Eldon took this passage of the answer, not as a proffer of the papers admitted to be in his hands for inspection, but as a submission to produce them in case the court should be of opinion that they ought to be produced (*t*).

It would seem that an attorney, who is not a party to the suit, cannot be compelled on motion to produce papers belonging to his client, who is a party, even if the client himself could be compelled to produce them (*u*).

It is no objection to an order for the production and inspection of books and documents in the *cus-*

(*s*) 1 Mer. 126.

(*t*) *Fenwick* v. *Reed*, 1 Mer. 123; 14 Ves. 213.

(*u*) *Wright* v. *Mayer*, 6 Ves. 280; *Busk* v. *Lewis*, 6 Madd. 29. When there is a *subpœna duces tecum*, see 6 Madd. 30; *Barnett* v. *Noble*, 1 Jac. & W. 228; *Furlong* v. *Howard*, 2 Sch. & Lef. 115; 6 Ves. 281; *Parkhurst* v. *Lowten*, 3 Madd. 123.

tody of a solicitor, as the common agent of several persons, that some of those persons are not parties to the bill. The defendant, who is jointly entitled to the use of the papers in question, having admitted their relevancy, and the possession of the solicitor, the court has a right to give to the plaintiff whatever access the defendant himself is entitled to; and as the solicitor could not refuse access to the defendant, so neither can he refuse access to the plaintiff (*v*).

Section 4.

Of the Privilege of Defendants generally, on the Ground of Confidence.

It has been observed, that the privilege of the client is not co-extensive with that which is allowed in the person of his attorney. In a court of equity, as against the party himself, a discovery may be compelled of matters, with regard to which the attorney, examined as a witness, would not be obliged to answer (*w*). In the latter case, it seems to be incumbent upon the examining party, to shew that the facts which he seeks to elicit have not come to the knowledge of the witness in that professional relation which obviously exists between him and his principal. When the interrogatory is addressed to a defendant, himself the principal, he cannot avoid answering by

(*v*) *Walburn* v. *Ingilby*, 1 Myl. & K. 79.

(*w*) *Preston* v. *Carr*, 1 Y. & J. 175.

merely shewing that the facts exist in the shape of communications to or from his professional agents or advisers: he must bring them within a much narrower ground of protection.

The privilege of secrecy in this case seems to extend to confidential communications between the client and his solicitor, and between the country solicitor and town solicitor (*x*), in their professional relations, or in the relation of solicitor and client; and to communications between the solicitor and third persons relating to the matters in question (*y*); and generally, to every communication made by the client to the counsel or solicitor, for professional assistance (*z*), either during the progress of the cause, or with reference to it (*a*), after the dispute which is the subject of litigation has arisen (*b*), and previous to the institution of the suit (*c*).

It may be collected from the decisions on this subject, that the circumstance of the communication having been made with reference to the matters which are in question in the cause, does not bring it within the protection of the rule. The essential feature seems to be, that it is made with reference to or in contemplation of the suit (*d*).

(*x*) *Hughes* v. *Biddulph*, 4 Russ. 191.

(*y*) *Curling* v. *Perring*, 2 Myl. & K. 380; *Walker* v. *Wildman*, 6 Madd. 47.

(*z*) 6 Madd. 47.

(*a*) 4 Russ. 191; *Bolton* v. *Corp. of Liverpool*, 3 Sim. 488; 1 Myl. & K. 97; *Preston* v. *Carr*, 1 Y. & J. 179; *Garland* v. *Scott*, 3 Sim. 396.

(*b*) 2 Myl. & K. 381; *Vent* v. *Pacey*, 4 Russ. 194.

(*c*) 4 Russ. 191.

(*d*) *Richards* v. *Jackson*, 18 Ves. 473; *Bolton* v. *Corp. of Liverpool*, 3 Sim. 467; 1 Myl. & K. 96.

There are cases which appear to extend the privilege farther than is here expressed. It was held by Sir J. Leach, that the protection comprehended, not merely communications made pending an action or suit, but every communication made by the client to counsel, attorney, or solicitor, for professional assistance, though not to cases where they are employed in matters not professional,—as in a treaty for the purchase of an estate (*e*). Subsequent authorities, however, seem to limit the principle in the manner which has been stated.

The propriety of compelling a discovery of cases submitted to counsel for opinion, has been of late much discussed. In *Radcliffe* v. *Fursman* (*f*), a decision of Lord King's, affirmed in the House of Lords, discovery was sought of the facts contained in a case which the defendant had submitted to his counsel for an opinion, and of the case itself, and the opinion thereon. The defendant was ordered to disclose the case, but not the opinion. In a recent judgment it was said, that the report in *Brown* is imperfect, and in one respect not correct, for it conveys an inaccurate notion of the nature of the demurrer. "But," continued the lord chancellor, "even by the report, and certainly by the printed

(*e*) *Walker* v. *Wildman*, 6 Madd. 47. See 1 Y. & Coll. 219.

(*f*) 2 Brown, P. C. 514, Toml. ed., cited and approved by Lord Hardwicke, 2 Atk. 214; *Radcliffe* v. *Davey*, S. C., cited by Lord Eldon, 18 Ves. 474, who adverts to the peculiarity, that the defendant in that case was trustee of the bonds; 6 Madd. 48, where Sir J. Leach observes, that this case has been followed *in specie*, but not in principle.

cases which I have examined, it appears plain that the record did not shew any suit to have been instituted or even threatened at the time the case was stated for the opinion of counsel, and the decision being upon the demurrer, the court had no right to know any thing which the record did not disclose. All the court knew was, that a case had been laid before counsel at some time, in order to satisfy the party consulting whether his rights had been affected by a certain lapse of time. And the ground on which the production was resisted appears to have been the mischief of disclosing statements confidentially made for the private ease and satisfaction of parties (*g*)."

In another case, where disputes had arisen at the dissolution of a partnership, one of the partners laid a case before counsel for their opinion with regard to some imputed errors in an account stated, but the errors assigned were not ultimately insisted upon, and the account was settled. Some years after, the partner who had taken the objections died, and his executors filed a bill impeaching the settled account and alleging errors. The defendant in that suit brought his bill for discovery, to which there was a demurrer as to so much as sought to discover whether the defendant had not in his possession the case or cases mentioned in the bill and the opinions thereon, or drafts or copies thereof: Lord Eldon said, " I am satisfied that in my own experience I have had cases of this kind laid before me for con-

(*g*) 1 Myl. & K. 95.

sideration, and the result was, that the defendant was advised to submit to answer. I have not, however, succeeded in my search for such a case." The demurrer was overruled as covering too much; the bill having sufficient allegation of facts contained in the cases and opinions material to the plaintiff's case, to the discovery of which he was entitled (*h*).

In the last case the lord chancellor remarked, that there was so much objection to breaking in upon the confidence between counsel or solicitor and client, that if it were *res integra* he would not be inclined to indulge such an inquiry. Lord Brougham, adverting to the consequence of there being no protection to this kind of communication, said, "It seems plain that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence may, and often does, contain the whole of his evidence, and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of the opinions, may always be obtained as of right, would produce the effect, and neither more nor less, that a party would go into court to try the cause, and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel.

(*h*) *Richards* v. *Jackson*, 18 Ves. 473.

Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least, if he were plaintiff,) postpone the trial and obtain a discovery of those new circumstances, which in all likelihood had been laid before counsel for advice (*i*)."

In *Bolton* v. *Corporation of Liverpool*, the discovery was decreed of cases which had been stated for the opinion of counsel, without reference to the proceedings in the immediate cause, and some years before the commencement of the action (*k*). In a subsequent case, Lord Abinger, adverting to this decision, observes, that he did not think it warranted by the cases which were made the foundation of it, and that he would not have allowed the production of these documents (*l*).

It has been observed, that there is no instance of a bill being filed, suggesting that, at a consultation between a party and his counsel, statements were made by the party which would defeat his claim, and praying for a discovery of these statements (*m*).

To the principle which restricts the privilege to communications made in contemplation of the suit, there is, however, one exception. It would seem that the opinions of counsel obtained, not only in contemplation of the suit, but at any time, may be withheld. When it is decided that the communica-

(*i*) 1 Myl. & K. 94.

(*k*) 3 Sim. 487.

(*l*) *Bellwood* v. *Wetherell*, 1 Y. & Coll. 219. See *Newton* v. *Beresford*, 1 Younge, 378.

(*m*) 3 Sim. 488, *per* Sir L. Shadwell.

tion to the professional person must be disclosed, it is a remarkable abridgment of the principle, to hold that the opinion given upon the case may be refused. It is not on the ground that the defendant has paid for the opinion, which the plaintiff might obtain in a like manner if he thought proper, for it has been held that the circumstance of the defendant having paid for documents does not protect them (*n*). No intelligible reason has been assigned for adopting this distinction as an universal rule. Many circumstances may be suggested in which a court of equity must, upon its ordinary principles, compel a disclosure of cases stated for professional advice. If relief be sought against that kind of fraud which arises upon a wilful suppression or misrepresentation;—to set aside a deed executed under a mistatement of a legal right or liability;—and, in a great variety of subjects of equitable cognizance,—such a disclosure may be necessary, and fall within the strict principle of discovery as evidence affirming the plaintiff's case. In all these instances, however, the opinion of counsel upon the case seems within the same reason as the case itself.

On a motion for the production of cases and opinions of counsel and other papers, Lord Eldon said, that he thought without prejudice to argument upon it, that the party himself could be compelled to produce them. He recollected many cases in which, as part of the conduct upon which the relief was to be asked, it

(*n*) *Bolton* v. *Corporation of Liverpool*, 3 Sim. 480.

was alleged that the defendant had taken opinions and they were in his possession, and that was charged as a fact, connected with other circumstances of conduct, from which an inference could be drawn as to the relief to be given (*o*).

If opinions are taken for the mutual benefit of both parties, they must, no doubt, be open to the inspection of both (*p*). And it is ground for inferring that they were taken for the mutual benefit of both, when they are taken by a tenant in possession concerning matters which relate to the obligation he is under to preserve his landlord's title (*q*).

The distinction between the case and the opinion appears to be strictly adhered to in the decisions which have followed *in specie* (*r*) the authority of *Radcliffe* v. *Fursman;* and where a second case was submitted to counsel, in which the opinion upon the first was embodied, the defendant was allowed to omit in the discovery of the second case, so much as recited the opinion (*s*).

The principle of this objection to discovery must, it would seem, extend as well to communications made to the defendant himself, without the intervention of a professional man, as to those which pass through that medium. Where the discovery was

(*o*) *Wright* v. *Mayer*, 6 Ves. 281.

(*p*) *Attorney-Genenal* v. *Berkeley*, 2 Jac. & W. 294.

(*q*) S. C. Ib.

(*r*) 6 Madd. 48, *per* Sir J. Leach.

(*s*) *Preston* v. *Carr*, 1 Y. & J. 178. The same rule, it seems, applies to letters containing *legal advice*. *Garland* v. *Scott*, 3 Sim. 396.

sought of letters from witnesses, Chief Baron Alexander held that the parties were not then entitled either to the discovery or to the names of the writers, which it would be sufficient to make known in time for cross-examination. "All the rules," he said, "with respect to the publication of depositions are decidedly in opposition to the production to the plaintiff of what are probably the statements of the facts which the witnesses will be able to prove, and they would not be any evidence if produced. I think, also, that the plaintiff is not entitled to the production of any documents relating to facts or circumstances occurring since the institution of the suit (*t*)." It has, however, been held, that where there are more defendants than one, they are bound to produce letters and copies of letters which have passed between them respecting the suit; letters between the parties themselves not being within the protection (*u*).

(*t*) *Preston* v. *Carr*, 1 Y. & J. 179.

(*u*) *Whitbread* v. *Gurney*, 1 Younge, 541.

CHAPTER IV.

OF EVIDENCES RELATING TO THE TITLE OF THE DEFENDANT.

SECTION 1.

Of the Rule that no Discovery can be compelled of the Evidences which are not connected with the Title of the Plaintiff, and which give Title to the Defendant.

THE application of the doctrines of discovery to the evidences, which are the subject of this rule, frequently involves questions of great difficulty and importance. All the objections to discovery that have been previously discussed, rest upon grounds which are collateral to the evidence itself. They do not deny the possible existence of evidence which might be favourable to the plaintiff, and of which, in some other state of things, the plaintiff might be entitled to the discovery; but they assert that such a state of facts does not exist, or has not been shewn, as will entitle the plaintiff to the answer which he seeks. Here, the state of facts which entitles the plaintiff to the answer is assumed, and the question is, not whether the answer shall be given, but to what it must be limited. The plaintiff has stated

facts which shew a title to the property in dispute, and he demands a certain answer or disclosure. The defendant does not found his objection to discovery on the ground that the plaintiff has not the title which he states, for that objection is beside the question; but he must, upon this argument, insist, that, even admitting that the plaintiff has the title which he sets out, the evidence which he claims to withhold cannot support it, and does, on the contrary, confer, or contribute to confer, a title upon himself. The principle of the present objection to discovery involves, in fact, the boundary which divides the right of the litigating parties to the exclusive knowledge or possession of their evidence; and it is therefore upon the application of this rule that the main controversy will always arise.

It is often of the highest importance to the defendant that he be not compelled to disclose documents which relate to the property in dispute, for the effect of such a disclosure may be detrimental to that beneficial enjoyment of the property to which, as the party in possession, he is entitled, at least until the court has pronounced its decision against him. Some of the inconveniences of the disclosure are obvious. It may deteriorate the value of the subject; it may defeat contracts which are in progress or in anticipation; and it may expose a title which is conscientiously good, to invasion from other quarters upon defects wholly foreign to the question in dispute, and not for the benefit of the plaintiff, but of strangers. "Permitting," said Lord Rosslyn, in a case where a

party claiming as heir female sought a production of title deeds, "a general sweeping survey into all the deeds of the family, would be attended with very great danger and mischief; and, where the person claims as heir of the body, it has been very properly stated that it may shew a title in another person, if the entail is not well barred. It may set up a title, not to the benefit of the plaintiff, but to the injury of the devisees, indulging a speculation to the prejudice of parties whose interest this court has no right to invade (*a*)." Against these consequences, in the exercise of this branch of their jurisdiction, the courts of equity have been scrupulous to guard. The right to the exclusive knowledge and possession of the deeds and evidences is incident to the property in the thing to which they relate. And, although that property is made a subject of litigation, there would be no more equity in giving to the plaintiff the benefit of such evidences before trial, farther than they may be necessary or useful to establish the title upon which he insists, than there would be in transferring to him in the same stage of the cause the beneficial enjoyment of the property which they concern. In a case before Chief Baron Richards, he observed, "During a very long course of practice in the court of Chancery, I have never known the production of documents ordered, but on a very strong case

(*a*) *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 71. See 3 Sim. 480, 481, in arg. *Bellwood* v. *Wetherell*, 1 Y. & Coll. 220; *Cock* v. *St. Bartholomew's Hospital, Chatham*, 8 Ves. 140, in arg. *Newcastle* Case, cited Id. 141.

of unanswerable equity; and I remember the time when that court required so satisfactory a case to be made out as seldom to make the order. The defendant, the owner of the documents, never can be called on to give any reason why he should not produce them, for all must depend on the plaintiff's ground of application, and the defendant needs no other protection than the jealousy of the court. If it be the modern practice of any part of the court of Chancery to require the defendant to protect himself by plea, I will never consent to the introduction of such a practice into the Exchequer. It is a doctrine of the greatest moment to titles, that a party should not be compellable to produce his securities (*b*)."

It is obvious that the discovery which is given by a court of equity cannot be designed to afford an opportunity for the examination of all the evidence which the defendant possesses regarding his proprietary and possessory rights generally. Upon the pleadings in every cause, there is necessarily some particular question raised for the decision of the court to which the cognizance of the matter belongs. The object of equity in enforcing discovery is to possess the plaintiff of the evidence which may tend to make available the right upon which he insists. All the facts or evidences in the knowledge or possession of the defendant material to the matters in dispute, must fall under some or one of three heads of description. They are,—*first*, evidence which may

(*b*) *Vansittart* v. *Barber*, 9 Price, 641.

tend to sustain the plaintiff's case;—*secondly*, evidence exclusively favourable to the defendant's case;—or, *thirdly*, evidence which has no bearing upon the immediate question, though it may illustrate the right of or give title to the defendant as against third parties, or illustrate the right of third parties or give title to them against him.

It is the fundamental principle of the doctrine of discovery, that a defendant in equity must disclose all the evidence which the plaintiff demands, and which may tend to support the plaintiff's case. To the discovery of all the evidences which fall under the first of the foregoing heads of description, the plaintiff is therefore entitled upon the general principle (*c*).

The general principle does not extend to the evidences included in the two last of the foregoing heads of description. All the evidences of the defendant which are comprehended within them, are, therefore, protected from discovery by the rule now under discussion (*d*).

(*c*) *Pine* v. *Smith*, Choyce Ca. in Cha. 113; *Gifford* v. *Tripconny*, Id. 163; *Moodalay* v. *Morton*, 1 Bro. C. C. 471; *Smith* v. *Duke of Northumberland*, 1 Cox, 365; *Earl of Salisbury* v. *Cecil*, 1 Cox, 277; *Stroud* v. *Deacon*, 1 Ves. 37; *Potts* v. *Adair*, 1 Anst. 259; 3 Swans. 268, n. (*a*); *Attorney-General* v. *Corporation of Poole*, cited Ib.; *Bird* v. *Harrison*, 15 Ves. 408; *Church* v. *Barclay*, 16 Ves. 435; *Marsh* v. *Sibbald*, 2 Ves. & B. 376; *Fenwick* v. *Reed*, 1 Mer. 126; *Newton* v. *Beresford*, 1 Younge, 381; *Unsworth* v. *Woodcock*, 3 Madd. 432; *Tyler* v. *Drayton*, 2 Sim. & St. 309; *Sparke* v. *Montriou*, 1 Y. & Coll. 103; *Bolton* v. *Corporation of Liverpool*, 3 Sim. 467; *Doe* dem. *Courtail* v. *Thomas*, 9 B. & C. 288.

(*d*) *Bishop of Hereford* v. *Duke of Bridgwater*, Bunb. 269;

It may be said that the evidence of the third class, which has no bearing upon the question at issue, should properly be protected from disclosure on the ground of immateriality. The objection of immateriality, however, is of a very narrow extent. It would be difficult to resist discovery, by insisting that it is not material, if it were admitted to be in any respect relevant to the matters in dispute, for materiality and relevancy, when considered as objections to discovery, are synonymous terms (*e*). Many cases may be suggested in which evidence of the third kind could only be protected on the present rule. If the title to an estate were in dispute, there may be counterparts of leases granted by the parties in possession. It may be impossible to omit setting out a list of such documents in the schedule in answer to the common interrogatories with respect to papers and writings. They would not be deemed immaterial, for, if they were leases granted by the defendant, they may contain provisions, admitting

Attorney-General v. *Corporation of Coventry*, Bunb. 290; *Borrington* v. *Borrington*, 3 Rep. in Cha. 18; *Capell* v. *Mym*, Cary, 16; *Stapleton* v. *Sherrard*, 1 Vern. 212; *Sherborne* v. *Clarke*, 1 Vern. 273; *Stroud* v. *Deacon*, 1 Ves. 37; *Buden* v. *Dore*, 2 Ves. 445; *Ivy* v. *Kekewich*, 2 Ves. jun. 679; *Ryves* v. *Ryves*, 3 Ves. 343; *Burton* v. *Neville*, 2 Cox, 242; *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66; *Mutloe* v. *Smith*, 3 Anst. 709; *Micklethwait* v. *Moore*, 3 Mer. 292; *Tyler* v. *Drayton*, 2 Sim. & St. 309; *Sampson* v. *Swettenham*, 5 Madd. 16; *Tomlinson* v. *Symer*, 2 Sim. 489; *Brazier* v. *Mytton*, 1 M'Clell. & Y. 618; *Bolton* v. *Corporation of Liverpool*, 1 Myl. & K. 92; *Pickering* v. *Noyes*, 1 B. & C. 262; 1 Dea. & Chit. 481.

(*e*) Part III. Chap. II. Sect. 1, p. 157; 11 Ves. 42.

the title of the plaintiff, and covenanting for the indemnity of either of the parties to the lease, in the event of being ejected. They would then be clearly evidence tending to establish the case of the plaintiff. It would seem, indeed, that in all those cases where the court has adverted to the possible dangers which might result from discovery by exposing the title of the defendant to the attack from other quarters, the necessary inference is, that there is a kind of evidence to be protected by the rule, which is immaterial to the cause.

The application of the present rule may be illustrated by the case of a plaintiff claiming as heir or devisee.

A plaintiff claiming as heir-at-law is entitled to every discovery which may be necessary to make out his title at law (*f*). "It would be a very delicate point," said Lord Rosslyn, "to order a general inspection into all deeds and settlements in behalf of a person claiming in the mere character of heir-at-law. I do not find any spark of equity upon which that application could be made to this court and supported. The title of the heir is a plain one, and it is a legal title. All the family deeds together would not make his title better or worse. If he cannot set aside the will, he has nothing to do with the deeds. He must make out his title at law unless there are incumbrances standing in the way, which this court would remove in order to his as-

(*f*) *Renison* v. *Ashley*, 2 Ves. jun. 461.

serting his legal right. There the principle of equity interferes (*g*)." If the heir-at-law states by his bill that he has brought an ejectment, but is unable to proceed, the court will compel such a discovery and production as may be necessary to remove the impediment to the trial (*h*). If the plaintiff is unable to draw his declaration in ejectment, owing to the boundaries having been confounded, he may come for a discovery of what are the farms and who are in possession (*i*). And as customary heir he might have been entitled to the discovery of such a fact as whether there were any unsurrendered copyholds (*k*). It is a necessary conclusion from the principle, that in every case the discovery which an heir-at-law can demand, is confined to the anterior, and cannot extend to the subsequent title (*l*).

On the same rule, a devisee is entitled, as against the heir-at-law, to no more than such a discovery and production of deeds as may be necessary to try the validity of the will (*m*).

A similar operation of the principle is seen in the case of an heir in tail, to whom a will is no answer. An heir in tail has, beyond the general right, such an interest in the deed creating the entail, that the

(*g*) *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 70. See *Legard* v. *Cossens*, Rep. t. Finch, 82.

(*h*) *Renison* v. *Ashley*, 2 Ves. jun. 432.

(*i*) *Loker* v. *Rolle*, 3 Ves. 4.

(*k*) *Jones* v. *Jones*, 3 Mer. 174.

(*l*) 2 Y. & J. 492; 4 Ves. 69.

(*m*) *Duchess of Newcastle* v. *Lord Pelham*, 3 Bro. P. C. 464, Tom. ed.; 8 Vin. Ab. 551, pl. 12; *Barker* v. *Ray*, 5 Madd. 64.

court, as against a person holding back that deed, would compel the production of it (*n*). The deeds of settlement creating entails are the evidence of the title of the heir who is specially designated in them. Where the plaintiff was a female, claiming as heir of the body, Lord Rosslyn held, that the defendant who was a trustee must give himself the trouble of inspecting the deeds and answering upon oath whether they create an entail or not, and that the plaintiff had a right to an answer to this question, but not to a general inspection of all the deeds of the family. "Wherever," he added, "you find a deed of entail, it would be very idle not to produce it, and also the deed which destroys the entail. It would be no breach of duty in the trustee to give that qualified communication of the deeds, but rather the contrary (*o*)." This passage seems to have been merely a recommendation to the parties for the purpose of arresting useless litigation and satisfying the trustee of the propriety of submitting to that extent. The principle is established, that an heir in tail is entitled to a discovery of the deeds creating the entail, but has no right to call for the deeds by which the entail is defeated (*p*).

If the heir in tail be defendant, he may, on the like principle, withhold the evidence upon which his title against the plaintiff rests. An example is seen where

(*n*) *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 71.

(*o*) S. C. Id.

(*p*) *Burton* v. *Neville*, 2 Cox, 242; S. C. 4 Ves. 67; *Anon.* Excheq. cited 4 Ves. 69; 3 Sim. 482, 489; 1 Myl. & K. 91. See Fonbl. Tr. Eq. 488.

the plaintiffs claimed under a trust to sell real estates charged by the will of a testator with debts and legacies. The defendant, who was the heir-at-law of the testator, and heir-at-law and devisee of his executor, denied by his answer that the testator was seised in fee simple, and was not tenant in tail of the real estates in question, and demurred to discovery of the settlement, its date, or of the parties to it; and the demurrer was allowed (*q*).

It is proper to observe, that high authorities may be adduced for affording to heirs, general or special, a more extensive discovery than is here expressed. Lord Hardwicke, whose consummate knowledge of equitable jurisdiction raises a degree of admiration proportioned to the diligence with which his judgments are weighed, is reported to have said, "that there is a certain degree of *relief* which the heir-at-law has, which is peculiar to this, to have an order for the inspection of all deeds and writings relating to the estate, to see whether he is disinherited, and by what means (*r*)." Lord Talbot had observed that it seemed "but a slight equity for an heir to say he wants writings, when his title as heir stands in need of no writings, unless he claims under some deed of entail concealed by the widow or executor (*s*)." On another occasion, Lord Talbot affirmed an order of the master of the rolls, directing, on the motion of

(*q*) *Wilson* v. *Forster*, 1 Younge, 280.

(*r*) *Harrison* v. *Southcote*, 2 Ves. 396; S. C. 1 Atk. 539; *Leman* v. *Alie*, Amb. 163.

(*s*) *Tanner* v. *Wise*, 3 P. Wms. 295.

the plaintiff, who claimed by virtue of a remainder in tail, that the defendants should produce, and leave with their clerk in court, the lease and release which had been executed by the last tenant in tail previously to suffering a recovery, observing, that, as the same thing would be done at the hearing, it was for the benefit of all parties it should be done before (*t*). This decision cannot be reconciled with the later authorities, and the circumstance, that a defendant must produce his title deeds when he comes to establish his case, is no ground for compelling the discovery before trial. Of an earlier decision of Lord Macclesfield (*u*) it is only necessary to observe, that, upon some points, it is impossible to follow it (*v*), and its citation as an authority has been commonly discouraged (*w*).

It must also be remarked, with regard to these cases, that they are regarded as administering equitable relief, in so far as the inspection of the deeds was ordered by the court (*x*). In this respect, therefore, they are not authorities on the question of discovery.

(*t*) *Bettison* v. *Farringdon*, 3 P. Wms. 363. Lord Rosslyn conjectures that it was a bill for relief, and that at the *hearing* means at the *trial*. See 4 Ves. 71; 6 Ves. 296.

(*u*) *Earl of Suffolk* v. *Howard*, 2 P. Wms. 177.

(*v*) *Per* Lord Eldon, 6 Ves. 296.

(*w*) 4 Ves. 70. See *Jones* v. *Jones*, 7 Pri. 663; *Baker* v. *Booker*, 6 Pri. 379; *Mutloe* v. *Smith*, 3 Anst. 709; *Davies* v. *Henley*, 1 Nov. 1793, cited Ib.

(*x*) Amb. 163; 2 Ves. 396.

Section 2.

Of the Kind of Evidence to which the Rule is applicable.

The cases in which this principle of protection has been most commonly insisted upon, are where the plaintiff has sought the production of title deeds. The frequent occurrence of the objection in this shape has led to remarks, from which it might be inferred that this ground of defence is peculiar to the muniments of title. An expression which may be thus mistaken is found in a judgment of Chief Baron Alexander. Stating the jurisdiction of equity to compel a party to produce documentary evidence in his possession, even if it be against his own case, he adds, that this, "though not an universal practice, is so general a rule as to be almost universal. Certainly, there are some few exceptions. The principal of these is where the documents sought to be produced relate to the title to a real estate. In that case equity will not order their production, unless the party can shew that he has also an interest in the same property, and consequently in the instruments relating to the title (*y*)." In another case the same Judge remarks, that the exception applies to the "title deeds relating to the inheritance." "As to these," he adds, "I have always understood that one party is not bound to give the other party an

(*y*) *Firkins* v. *Lowe*, 13 Pri. 198.

opportunity of examining his title deeds (*z*)." And in another decision, the lord chief baron observes, that he understood the rule, that a party is not bound to disclose his case, to be confined to mere matters of title, and not to apply to matters of account (*a*).

It would, however, be difficult to limit the operation of this principle in a manner which shall confine it to any particular kinds of evidence. Whether the evidence consists of deeds, or documents generally illustrative of title, the rule must have the same application; and between written and parol evidence, or evidence solely resting in the memory of the defendant, with reference to this question, there seems no sound distinction (*b*). The application of the principle to every species of evidence is seen in those cases where the defendant makes out a title adverse to that of the plaintiff, and the plaintiff inquires how he makes out and derives his title, or what are the

(*z*) *Collins* v. *Gresley*, 2 Y. & J. 491.

(*a*) *Corbett* v. *Hawkins*, 1 Y. & J. 421; *Compton* v. *Earl Grey*, 1 Y. & J. 158.

(*b*) The following *Article* from M. Domat's collection of the Civil Law (Eng. Ed. by Strahan) may not be inappropriate on this point: "One may refuse to produce papers, if he himself does not make use of them; but one cannot refuse to answer to facts that are pertinent, for the parties ought to know the truth of all the facts, whereof the knowledge is necessary for determining what is in dispute. And this knowledge ought to be common to all the persons who have an interest therein. But journals or other papers which belong only to one party, are not common both to the one and the other. And these papers may chance to contain facts which ought to be kept secret, and which perhaps have no relation to the matter in dispute." Book 3, Tit. 6, Sect. 5, Art. 10.

particulars of his pedigree, which the defendant is not bound to answer (*c*). "He is to make it out," said Lord Rosslyn, "but he has no business to tell the plaintiff how he is to make it out (*d*)." And where an answer was excepted to, for not setting out what deeds and writings the defendant held, relating to his own title, Lord Hardwicke held, that the interrogatories on this point did not require to be answered (*e*).

The present principle, it is true, has been rarely insisted upon, but for the purpose of guarding the defendant from the necessity of producing some documentary evidence. This arises from the manner in which discovery is sought, and the form in which objections to answer are taken in equity. The allegations in the bill, and the interrogatories founded upon them, which are addressed to the knowledge of the defendant, are either material to the subject of the suit, or they are irrelevant. If they are not obviously irrelevant to the subject, the defendant would not be advised to resist discovery,—if they are clearly immaterial or irrelevant, that circumstance raises a distinct ground of objection. The defendant is seldom required, in answer to an interrogatory of the plaintiff, to state a fact directly adverse to the title alleged in the bill; and if he were so required, there

(*c*) *Glegg* v. *Legh*, 4 Madd. 203; *Ivy* v. *Kekewish*, 2 Ves. jun. 679; *Ritson* v. *Sir J. Danvers*, Duchy C. of Lancaster, Oct. 1787; S. C. Nov. 1790; *Att.-Gen.* v. *Sir J. Danvers*, Jan. 1792, cited Ld. Red. Tr. 190; *Adderley* v. *Sparrow*, Chan. Hil. 1779, cited Ld. Red. Tr. 189.

(*d*) 2 Ves. jun. 679, a.

(*e*) *Buden* v. *Dore*, 2 Ves. 445.

would not often be any rational objection to stating it. It is, perhaps, chiefly in those cases where the purpose of the interrogatory is to obtain an admission that the defendant possesses papers or writings, in order that the plaintiff may, upon that admission, move for their production, that it is necessary to appeal to this principle to avoid an answer. In such cases, *Buden* v. *Dore* (*f*) is an authority for resisting the discovery.

With regard to documentary evidence, the practical effect of the law of discovery is otherwise. It is commonly the object of the plaintiff to render his charge and interrogatory respecting papers and writings as comprehensive in expression as it is possible to frame it; and may be equally the purpose of the defendant, if he be compelled to answer, to withhold all the documents which the principle will enable him to protect from disclosure. It results from this practice, that there is seldom occasion to resort to the present rule, but for the purpose of avoiding the production of written evidence.

Section 3.

Of the Rule that the Defendant is not compelled to Discover his Evidence, if it cannot tend to establish Affirmatively *the Case of the Plaintiff.*

It is not a sufficient foundation for discovery, to insist that the evidence sought will prove that the

(*f*) 2 Ves. 445.

defendant has no title, and that the title will therefore devolve upon the plaintiff as a consequence of that failure in the defendant (*g*). That which has been said of the action of ejectment seems not less applicable to every suit seeking to change the right and the possession of property. "The plaintiff cannot recover but upon the strength of his own title. He cannot found his claim upon the weakness of the defendant's title. For, possession gives the defendant a right against every man who cannot shew a good title (*h*)." This principle is peculiarly applicable to the question of discovery, where the court is called upon, without pronouncing any opinion upon the rights in dispute, to communicate to the plaintiff the evidences which are a part of the possession of the defendant.

A case has been put of an ejectment brought against a party in possession, who cannot, by filing a bill against the plaintiff in the action, compel a discovery of his title deeds, by *merely* alleging that they would shew that he had no title (*i*). The defendant is left to sustain his case, or defend his possession as he may (*k*). The purposes of justice are accomplished in affording to the plaintiff all the evidence that tends to establish affirmatively the facts upon which he insists.

(*g*) *Compton* v. *Earl Grey*, 1 Y. & J. 154; *Bolton* v. *Corporation of Liverpool*, 3 Sim. 489. See Id. 472, in arg.; S. C. 1 Myl. & K. 92.

(*h*) *Per* Lord Mansfield, 4 Burr. 2487.

(*i*) See 3 Sim. 480.

(*k*) Id. 489.

The proposition is exemplified by a late case, in which discovery was sought in aid of the defence to an action by a corporation for town dues. It was urged that certain grants and documents in the custody of the corporation afforded evidence negativing their right to the duties, and therefore constituted the defence to the action, and gave the parties a common interest in them (*l*). But it was held to lie upon those who insisted on having a title to levy the tolls, to make out a title contrary to the force of the common law; and that they were not bound to disclose it in the discovery suit (*m*): the same principle was affirmed on appeal. "A party," said Lord Brougham, "has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those, which, instead of supporting his title, defeat it by entitling his adversary. Those under which both claim he may have, or those under which he alone claims. The plaintiff does not claim any thing positively or affirmatively under the documents in question. He only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can those documents prove his title? Only by disclosing some defect in that of the corporation. The description of the document

(*l*) *Bolton* v. *Corporation of Liverpool*, 3 Sim. 472.
(*m*) Id. 490.

is, that they rebut or negative the plaintiff's title: they are the corporation's title, and not his, and they are only his negatively, by failing to prove that of the corporation. He rests on the right which he has in common with all mankind to be exempt from dues and customs, and he says, prove me liable if you can. The corporation have certain documents which they say prove this liability. He cannot call for these documents merely because they may upon inspection be found not to prove his liability, and so help him and hurt his adversary, whose title they are (*n*)."

It may be said, that the plaintiff in the last case sought only to collect the means of impeaching the title of the defendant, the negation of which established his own; and that, to hold it incompetent to him to take this course, must involve a conclusion at variance with known rules of equity; that, following out the principle, no discovery could be given where the object is to negative the title of the defendant, even though the direct consequence be to establish the case of the plaintiff. Discovery is commonly given to an heir who seeks to impeach a will (*o*), and yet that case falls within the description which such a rule would comprehend. There, however, and perhaps in all cases which may, at a first impression, seem adverse to this principle, it will appear that the plaintiff does not rest on a mere ne-

(*n*) S. C. 1 Myl. & K. 92, *per* Lord Brougham. See *City of London* v. *Thomson*, 3 Swans. 265, n. (b).

(*o*) *Pitts* v. *Short*, 17 Ves. 213.

gation of the defendant's claim, but insists upon some positive ground entitling him to the assistance of the court, such as fraud or other circumstances of equitable cognizance, to a discovery of which no objection of this kind can be raised.

The principle has been affirmed in a subsequent case. An occupier, the defendant in a tithe suit, filed a cross bill against the plaintiff, the impropriate rector, for discovery whether the plaintiff was in any and what manner entitled to the tithes in question, and under what deeds he claimed. "The plaintiff in this suit," said Lord Abinger, C. B., "does not suggest upon his bill any doubt whether he may not be put to additional expense, and be harassed again by some person claiming a paramount title to the rectory. He simply says, that the defendant is not rector; and that brings it to the naked question, shall he be allowed to call on the defendant to produce a deed,—not because it makes out his own case,—not to defend himself,—but to expose the plaintiff to all the dangers of a discovery? The possession of the rector, without any adverse claimant, is *primâ facie* evidence of his title; and if, in any document to be so produced, a flaw should happen to be found, it would be a summary means to deprive the rector of his right, if that deed were exposed in a court of equity, where other persons might take advantage of the defect. At law, the rector must prove his title, as in any other case, and the defendant might take advantage of any imperfection; but to allow such an application as the present, would be to enable the defendant in a tithe suit, in every

case, to call on the plaintiff to produce the particulars of his title (*p*)."

The objection, that the matters sought to be discovered cannot tend to establish *affirmatively* the case of the plaintiff, is not a general and independent objection to discovery. The defendant, in order to resist discovery on this ground, must first bring the evidence he would withhold within the class described in the first section, and which is protected by the present principle: it must be manifestly foreign to the particular title upon which the plaintiff insists, and it must give title to the defendant. If the effect of this objection be not thus limited, upon what principle, it may be inquired, is *any* discovery given in a case where a defendant at law relies upon a defence which no deeds can substantiate affirmatively; such, for example, as a right, in common with every subject, to import or to export merchandize, or to traffic, free from the imposition of tolls or duties. This was the case of *Bolton* v. *Corporation of Liverpool* (*q*). The corporation brought an action to recover local duties on goods imported and exported. The defendant filed a bill for discovery in aid of his defence. It was not suggested that the evidence sought could prove his exemption from the duties in question affirmatively, as by establishing any grant or prescriptive right in his favour. The claim to the discovery was argued upon the ground, that it would negative the right of the corporation to the duties; and the dis-

(*p*) *Bellwood* v. *Wetherell*, 1 Y. & Coll. 220.

(*q*) 3 Sim. 467; 1 Myl. & K. 88.

covery, which was successfully resisted upon the present principle, extended no farther than the deeds and papers which were described in the answer as evidencing the title of the corporation to the town and lordship of Liverpool, and the dues in question.

It may be here objected, that, if the evidence which is within this rule must of necessity be previously under the protection of a principle upon which its discovery might be resisted, the rule is inoperative: that it merely subjoins a second ground of defence, where the first ground would be sufficient. But the rule is not established as an additional principle of protection. It has no other object or effect than that of negativing an alleged equity upon which the plaintiff seeks to avert the operation of the general rule, which excludes from discovery the evidences that give title to the defendant. It is nothing more than a principle necessarily introduced to preserve the integrity of the general rule against the admission of an antagonist principle, by which the effect of the general rule would be destroyed.

Section 4.

Of Discovery in aid of a Defence, which is given to a Defendant, who, without insisting upon a Title in himself, brings a Bill impeaching the Title of the Plaintiff.

It has been seen, in considering the preceding rules, that a plaintiff or a defendant, who sets up a

right or a title to possession in himself, and for his own benefit, is entitled to all the evidence which can tend to affirm his case, but that he is entitled to none of the evidences of the defendant which cannot tend to establish affirmatively the title which he claims. A party who is sued may not, however, insist upon a right in himself to the subjects in dispute, but, admitting that he has himself no title, might suggest that the plaintiff is without a title to the whole or to part of the subject which he claims, or, that having had a title, he has conveyed it to some other person (*r*). In such cases, so far as the plaintiff in the bill of discovery, or the cross bill, charges matter shewing that the defendant, by whom he is sued, possesses no title to the subject of the suit, or that his title extends only to a part of the subject, or that he has aliened his title,—the bill must be answered, notwithstanding that the answer might involve a disclosure of deeds or instruments wholly unconnected with the *possession* of the plaintiff, and which are evidence of the title of the defendant.

In a case before Lord Hardwicke, a bill, in the nature of an interpleading bill, was brought by the tenant of an estate, against a party claiming the possession and mesne profits. The bill suggested that there was issue in existence, an infant, who would be entitled to the estate, and prayed that if

(*r*) The same bill may suggest that the plaintiff, who is the defendant in the original suit, is a trustee or stakeholder, or that he is entitled for his own benefit. The charges arising from the former ground of equity need only be answered.

there were any such person he might interplead, and that the defendant might be restrained from bringing actions. "The question," Lord Hardwicke said, "comes to this,—whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, *to have it set out, and see whether that title be not in some other.* I am of opinion he may, to enable him to make a defence in ejectment, even considering him as a wrong doer against every body (*s*)." The principle is adopted and expressed by Lord Redesdale in nearly the same language (*t*), with the important omission of the words in italics, which seem, however, to form a necessary term in the proposition, not only to shew the application of the judgment to the case then before the court, but also to reconcile the principle which is laid down in this case, with the other decisions of Lord Hardwicke which affirm the proposition that the evidences of the defendant's title are protected from discovery (*u*).

The decision in the case of *Metcalf* v. *Harvey*, seems to extend no farther than is involved in the principle now well established, that a bill raises a sufficient foundation for discovery which suggests a cause of apprehension, that, if the defendant should

(*s*) *Metcalf* v. *Harvey*, 1 Ves. 249.

(*t*) Ld. Red. Tr. 53. See *Selby* v. *Selby*, 4 Bro. C. C. 11, cited 1 Anst. 1, explained 11 Ves. 291; Coop. 213.

(*u*) *Buden* v. *Dore*, 2 Ves. 445; *Stroud* v. *Deacon*, 1 Ves. 37.

recover in his suit or action, the plaintiff may yet be sued by some other person. In a recent case, where the object was to obtain evidence to prove that the legal title to tithes sued for was not in the plaintiff, but was in trustees of unsatisfied terms for the benefit of incumbrancers, the plaintiff was obliged to answer the charges in the bill of discovery, that there had been a severance of the tithes from the rectory, and that he had made a conveyance of them, although he was not bound to discover his title or to set forth his title deeds or the contents of them (*v*). To such a discovery the defendant is clearly entitled, if, as may perhaps be inferred from the ultimate decision in the original suits, he may require to be satisfied that the annuities and interest charged upon the tithes have been paid up to the time when the bill was filed (*w*). A like point was decided in the case of Drury Lane Theatre. The defendant had brought covenant for dilapidations, and the plaintiff filed a bill alleging that he had learnt that the defendant had conveyed his interest to trustees, who threatened and intended to proceed for the same cause. The defendant pleaded the total destruction by fire. The discovery, it was insisted, was necessary to the plaintiff's defence at law, for thereby only could the damages in this action be restricted to the share due to the defendant, commensurate with the duration of his title; for, after the assign-

(*v*) *Glegg* v. *Legh*, 4 Madd. 193; *Parker* v. *Legh*, 4 Madd. 208.

(*w*) *Glegg* v. *Legh*, 1 Bligh, N. S. 302; *Cherry* v. *Legh*, Id. 306.

ment, covenant would lie in the assignee, and, even if the defendant recovered sufficient to rebuild, the plaintiff would not then be exonerated from further claims. The court held, that as the defendant could recover damages at law up to the time of bringing his action, unless the plaintiff could shew in his defence that the defendant had previously parted with his title, the plaintiff had a right to know how that fact was, and for that purpose was entitled to see the deeds by which the defendant had transferred his interest (*x*).

In a case before Lord Abinger, C. B., the defendant to an original bill for tithes put in issue by his answer the title of the plaintiff, who was the lay impropriator, and he then filed a cross bill for discovery of the plaintiff's title, charging also that he was only a portionist. The answer to the cross bill denied that he was only a portionist, and submitted that he was not bound to answer the charge with regard to his title deeds. Upon exceptions to the answer, the lord chief baron lays it down in his judgment, that "the obvious line to be drawn is this—that though in general the defendant has no right to a discovery of the plaintiff's title; yet, in certain cases, he will be entitled to a discovery of the nature, though not of the evidence, of that title. Thus, where a party files his bill as rector, the defendant may file a cross bill, to see whether the plaintiff in the original suit is entitled to have that

(*x*) *Duke of Bedford* v. *Mucnamara*, 1 Price, 208.

which he admits may be due to somebody. The defendant may allege that some other person is entitled, and in such case he may file his bill of interpleader. If he does not go that length, he may suggest that he has had notice that some other person is entitled paramount to the plaintiff, or that the plaintiff has parted with his right to the tithes; and in such case, though there is no ground whatever to make the party disclose the evidence of his title, still there is ground to call on the party to discover the nature of his title, so that the defendant shall not be harassed a second time. That would apply to several cases: as, for instance, if the defendant to the original suit had established a modus, and it then turned out that the plaintiff had parted with his interest, a person claiming by a paramount title might say that he was not bound by that decision. It is clear that in such case the defendant would have a claim to discovery of the nature of the plaintiff's title, in order to protect himself in that particular payment (*y*)." "The case," concluded Lord Abinger, "by which the general rule is entrenched upon, and which forms an exception to the rule is, where it is expedient that the defendant should be protected from any adverse right set up by a paramount claimant, and from agitating the matter over again (*z*)."

It is clear, that though these are grounds for discovery peculiar to the situation of a defendant, yet

(*y*) *Bellwood* v. *Wetherell*, 1 Y. & Coll. 216. (*z*) Id. 220.

they are in perfect accordance with the general principles upon which an answer is required. The discovery will establish the case of the plaintiff, which is a title to be protected from the danger in which the defendant has placed him by taking an advantage of his want of knowledge with regard to the reality and extent of the defendant's title, and of the imperfect means of defence which is the consequence of that ignorance.

There are, however, some doubts which arise upon late decisions, the language of which seems to import that a distinction with respect to discovery might arise out of the circumstances of the possession being either recent or of long duration, and that there are cases in which the discovery may be demanded of the nature of the title of the plaintiff, though not of the evidences of that title. The present subject cannot properly be dismissed without adverting to these distinctions.

It has been submitted, that the authority of Lord Hardwicke, in the case which he put of a tenant defending himself in ejectment, is perfectly consistent with the present rule and with the other decisions of the same judge. It has not, however, been so considered. Chief Baron Eyre observed, that the rule laid down by Lord Hardwicke goes very far, and he would not be inclined to follow it to that extent, without examining further into the authority of the decision (*a*). Lord Abinger, alluding to a

(*a*) *Bowman* v. *Lygon*, 1 Anst. 1. How far the principle laid down in this case is overruled, see 1 Y. & Coll. 215.

similar case, says, "the observation to be made as to that is simply this—where a party is in possession of an estate, and a perfect stranger comes to turn him out, alleging himself to be the person entitled, it is but reasonable that the party so attacked should have an opportunity of knowing the plaintiff's case; so far as whether he claims as heir-at-law—whether he claims under a devise, or whether he alleges any imperfection in the defendant's title deeds. There the defendant is taken by surprise; and therefore I can easily understand in such a case why, not the evidence, but the nature of the title, should be disclosed. But in cases of recent possession, where parties well know the nature of each other's titles, there is no ground to compel any such discovery as that which is here required. That appears to me to be an answer to the argument derived from the cases of ejectment (*b*)." "Where," he added, "a corporation claims a toll to be due from the inhabitants of a town, then I think it would be both expedient and just, not that the evidence of their title, but that the nature of their claim, should be discovered (*c*)." "The court," it was said by Eyre, C. B., "will exercise their discretion in allowing the plaintiffs to search into the title, any further than for the purposes of the suit (*d*)."

It must, however, be observed, that there does not appear, in any of the cases, a definition of what

(*b*) *Bellwood* v. *Wetherell*, 1 Y. & Coll. 218. See also *Whyman* v. *Legh*, 6 Pri. 88.

(*c*) Id. 219.

(*d*) *Bowman* v. *Lygon*, 1 Anst. 1.

is to constitute such a recent or an ancient possession, as will entitle the plaintiff or the defendant to the benefit of the distinction which is laid down. Nor does any example that has been given, seem sufficiently explicit to enable the draftsman in equity to frame an answer which shall disclose the nature of the title, and preserve secrecy with regard to its evidences. In the case suggested by Lord Hardwicke, he expressly holds that the title is to be *set out;* and in all the authorities cited in the present section, it appears that so far as the plaintiff has raised a ground for discovery, the answer must be full, and all deeds and evidences necessary to complete it must be disclosed. It is deserving of consideration whether a rule establishing a right to discovery upon a particular matter, but not extending to a full discovery, will not, from the circumstance that it is indefinite, produce the inconvenience of an appeal to the discretion of the court in every case.

It should also be remarked, that the cases which suggest these distinctions have all occurred in the Exchequer, where the exceptions are brought before the court in the first instance, and where the rule, with regard to answering fully, is not generally applied. It seems impossible that a limited answer of the nature which appears to be contemplated could be framed in Chancery; for the court would not try the question of title upon the exceptions to the report of insufficiency, and if the defence were pleaded, no answer could be given.

Section 5.

Of the Effect of Reference in the Bill or Answer to Documentary Evidence.

If a deed or instrument be connected with the title of the plaintiff, or if it tend to sustain or illustrate his case, to say that he is entitled to the discovery of it, is merely a repetition of the general principle which it is the object of this treatise to developе. The only difference is with regard to the manner in which the discovery is given. The mode that convenience suggests, and which long practice has established, is that of obtaining the production of the documents themselves, instead of adding to the length of the record and increasing the expense of the proceedings by setting them out in the answer (*e*). There is no substantial difference in the discovery arising out of this circumstance: it is neither extended to any documents which do not fall within the principles that have been already discussed as applicable to discovery generally; nor is it abridged by excluding the plaintiff from the benefit

(*e*) See *Hornby* v. *Pemberton*, Mos. 57, where the bill required the defendant to set forth all books of account, letters, entries, &c., which were in his hands and belonged to the plaintiff or concerned the account *in his verbis et figuris*. The defendant set forth a particular in a schedule, which was excepted to and reported insufficient; but Lord King overruled the exception, and inveighed severely against the counsel by whom it was taken, holding it sufficient to direct them to be produced upon oath. The circumstance that the books were *abroad*, does not affect this point.

of such evidence (*f*). The plaintiff, by production, has access to, and at the hearing or the trial may read, every book, letter, memorandum, or paper referred to by the answer; as every such book, letter, or other paper is a part of the answer (*g*). "When the court orders letters and papers to be produced, it proceeds on the principle that these documents are, by reference, incorporated in the answer and become a part of it. Being in the office, the effect is the same as if they were stated in *hæc verba* in the answer (*h*)." It is evident, therefore, that the question of *production* is entirely a question of discovery, for the right of the plaintiff to discovery must be the same whether the subject has been committed to writing or is to be drawn from the recollection of the defendant. There are, however, some rules which are peculiar to the shape in which the evidence exists, inasmuch as the acts of answering a question and of producing a paper are necessarily performed by a different process. The rules which apply to the *manner* of answering or of objecting to answer will be considered in another place (*i*), but it will be proper to examine under the present head some cases which might appear to abridge the operation of the principle, that a plaintiff is not entitled to a discovery of the evidences of the defendant, and which, if it be determined that they have that effect, must, in an equal degree, extend the boundary to

(*f*) *Ante*, p. 19.

(*g*) *Marsh* v. *Sibbald*, 2 Ves. & B. 376.

(*h*) *Evans* v. *Richards*, 1 Swans. 8.

(*i*) Part IV.

which, by the foregoing rules, and by the general principle, it would appear that discovery is limited.

In a recent case, the plaintiff claimed certain estates as heir-at-law. The answer commenced by setting out the defendant's own title: for that purpose it stated four several fines, *sur conusance de droit come ceo &c.*, levied of the estates in question; and it also stated the effect of the several deeds declaring the uses of the fines. The statement concluded in these words, "as by the said several fines, and the proclamations made thereon respectively, now remaining of record in the said court, and by the said several deeds hereinbefore mentioned, to which, *for greater certainty*, the defendant craves leave to refer when produced, will appear." These deeds were, with many others, enumerated in the schedule to the answer, which admitted that all the deeds and documents mentioned in the schedule were in the defendant's possession. In a subsequent and distinct part of the answer, directed to the case set up by the bill, the defendant denied that the said fines, or any of them, were or was declared to enure to any uses under which the plaintiff, as heir-at-law of the testator, supposing him to be such heir-at-law, was entitled to the estates, or any part thereof; and he further denied that the said documents or writings, or any of them, or any documents which were then or had been in his possession or power, or which he had then or ever had access to, did contain recitals or references shewing the truth of the several matters in the bill mentioned, or any of

them, save in so far as the same were thereinbefore admitted to be true, or particularly shewing the truth of the several matters in the said bill stated, as to the said plaintiff's pedigree or any of them; and he further said, that the said documents related to, and made out his, the defendant's, title to the estates and premises so purchased by him as aforesaid, and did not, according to the best of the information and belief of the defendant, shew, or tend to shew, any title in the said plaintiff thereto, or to any part thereof (*k*).

Upon a motion that the defendant should produce and leave with his clerk in court, for the plaintiff's inspection, the several deeds before mentioned, declaring the uses of the aforesaid fines respectively, the master of the rolls granted the application, on the ground that the defendant, having, by the words of reference, incorporated the deeds in question with his answer so as to form a substantial part of it, the plaintiff was entitled to see every part of the answer. The order was confirmed by the lords commissioners on appeal; and it was held "to be perfectly settled that where a defendant in his answer states a document shortly or partially, and *for the sake of greater caution* refers to the document, in order to shew that the effect of the document has been accurately stated, in such a case the court will order the document to be produced (*l*)."

This decision is of great importance, inasmuch as

(*k*) *Hardman* v. *Ellames*, 2 Myl. & K. 745. (*l*) 2 Myl. & K. 758.

it is the first case in which it has been expressly held that a certain form of reference to an instrument by the defendant in his answer, will so destroy the effect of his oath, as to the tendency of the instrument with respect to the case of the plaintiff, that the court will then undertake to judge, whether, notwithstanding the oath of the defendant, it may not by possibility assist the plaintiff.

The judgments of the master of the rolls and of the lords commissioners seem to proceed upon two grounds: *first*, on the ground of the *reference by a short or partial statement* of the deeds; and, *secondly*, on the ground of the reference having been coupled with the *expressions of caution and uncertainty*. It does not appear by the report of the judgments, whether, in the absence of either of these terms of description, the order would have been made; but from the citation by the lords commissioners of the authority of *Herbert* v. *The Dean and Chapter of Westminster* (*m*), and the comparison of the principal case to that of *Firkins* v. *Lowe* (*n*), which seem plainly referable to the point of uncertainty, it may perhaps be concluded that the decision chiefly rests upon that ground. There would seem to be many difficulties in placing it solely upon the circumstance of the document being shortly or partially stated. The importance of the question, which regards the extreme limit of the right to discovery, calls for a distinct consideration of these several

(*m*) 1 P. Wms. 773. (*n*) 13 Pri. 193.

grounds. Reserving for the next section the point of *uncertainty*, the effect of a reference to an instrument which the defendant describes, upon oath, as giving title to himself, and not tending to sustain the case of the plaintiff, requires to be examined under the present head.

In the judgment of the lords commissioners (*o*), three states of circumstances are suggested:—where the documents are shortly stated and referred to in the answer *for greater certainty*, as in the case before the court;—where they are referred to, but the possession is not admitted, in which case it is clear that the production cannot be ordered (*p*), unless the documents are in the hands of some person over whom the defendant evidently has control (*q*);—and where the documents are not referred to, but are admitted to be in the defendant's possession, "when the question whether the defendant shall produce them or not is determined by considering whether the documents do or do not relate to the title of the plaintiff." "If," it was said, "they relate solely to the title of the defendant, in that case the order for production is not made: this appears from the case of *Bligh* v. *Benson* (*r*): on the other hand, if they are material to the plaintiff's case, the court will order their production, as in the case of *Firkins* v. *Lowe* (*s*)."

(*o*) 2 Myl. & K. 755.

(*p*) *Darwin* v. *Clarke*, 8 Ves. 158; *Erskine* v. *Bize*, 2 Cox, 226.

(*q*) 7 Pri. 207; 6 Ves. 281; 1 Mer. 123.

(*r*) 7 Pri. 205.

(*s*) 13 Pri. 193.

The court adverted to these decisions as examples of the cases in which the question of title arises; but it does not appear that it was intended to confine the application of that question to cases of this kind. It has been suggested that there are necessarily two classes of evidence which fall within this principle of protection (*t*), the deeds or instruments which are relied upon by the defendant as interposing a bar to the claim of the plaintiff in the identical suit, and the documents which are not specifically relied upon as a defence, but which are generally illustrative of title. The documents in the cases of *Bligh* v. *Benson* and *Firkins* v. *Lowe* were strictly of the latter class. They consisted of books of account which had been kept by preceding rectors and vicars, and which it was insisted would be evidence in the one case against, and in the other case in favour of, the modus which was set up. It is obvious, that a special reference in the answer to evidence of this general kind is rarely necessary; and the question in all such cases must, as it was held by the lords commissioners, be determined by considering whether the documents do or do not relate to the title of the plaintiff. This does not, however, exclude the protection from the first class of evidence, or that upon which the defendant specifically relies; nor can it be inferred from the terms of the judgment, taken in connexion with the cases which affirm the principle that such was their lordships' in-

(*t*) Sect. 1, *ante*, p. 187.

tention. The occasion or the necessity that arises for a special reference to instruments under which the defendant *claims or justifies*, is often wholly different from that which arises with regard to merely corroborative evidence, as in the two cases referred to.

It was laid down in a tithe suit in the Exchequer, by Lord Chief Baron Macdonald, that, though a bill must set forth an accurate statement of the plaintiff's claim, for he is bound to know it before he brings it into court, yet it is sufficient in an answer, for which there is only a limited time, to give such a statement as will inform the plaintiff of the general nature of the case to be made against him (*u*). And if it were possible to frame answers generally upon such a principle, all particular reference to deeds or instruments might probably be avoided. It may, however, be assumed that this is not generally possible; and if it were, the protection of evidences by a course which is not open both to the plaintiff and defendant would scarcely have been in the contemplation of the court in delivering their judgment in *Hardman* v. *Ellames*. It may, for the present purpose, be assumed that some brief statement of the deeds upon which the defendant relies is at least indispensable; and the inquiry is, whether, in such a case, if the oath of the defendant, with regard to their effect, be positive, and conveys no uncertainty, the protection of the defendant's evidences from discovery is yet taken away.

(*u*) *Baker* v. *Athill*, 2 Anst. 493.

If the decision of the lords commissioners were to be understood to rest on the ground of reference, apart from the expression of uncertainty, the question would arise, whether there remained any means of protecting from discovery and production before trial the very deeds or instruments upon which the plaintiff and the defendant found their respective claims. The effect of the reference in the bill or in the answer must, there is no doubt, be the same; the defendant, in the former case, filing a cross bill to obtain an admission of the possession of the instrument, and the plaintiff, in the latter case, if the admission has not already been made, amending his bill for the same purpose.

It may be answered, that the obvious course would be to decline any admission as to the *possession* of the documents; and, as the order would not be made without that admission, the production could not be enforced. That the defendant may decline answering questions as to the possession of instruments which obviously relate to his own title exclusively, the case of *Buden* v. *Dore* (*v*), before Lord Hardwicke, is an unimpeached and unquestionable authority. If the plaintiff seeks to avoid the effect of this principle, by charging that the documents in question will tend to establish the title which he claims, the defendant may deny such charges, and preserve to himself the benefit of the protection (*w*). Whether the defendant may, by *answer*, decline to

(*v*) 2 Ves. 445. (*w*) *Stroud* v. *Deacon*, 1 Ves. 37.

answer, or must take the objection by *demurrer* or *plea*, is considered in another place (*x*).

It may however happen, that, from some circumstance of difficulty, or from inadvertence, the defendant has, in reply to the general interrogatory as to material papers, included the documents in question in the schedule to his answer, and admitted the possession of them. This alone has in no case been held to exclude the protection. If it had been intended by the lords commissioners to decide, that a mere reference, neither expressing nor implying uncertainty, is sufficient to take away from the defendant the benefit of the rule, there is no doubt that the authority of the late case of *Sampson* v. *Swettenham* (*y*), and of the other cases affirming this principle of protection (*z*), would have been expressly denied. None of these authorities seem however to be impeached in the judgment, and the case of *Burton* v. *Neville* (*a*) is adverted to without disapproba-

(*x*) Part IV.

(*y*) 5 Madd. 16. The motion was, that the defendants "might within a fortnight deposit and leave with their clerk in court the indenture mentioned in this cause, bearing date the 2nd May, 1780, and purporting to be between Susannah Allesbrook of the one part, and Peter Nightingale, of ——, in the county of Derby, of the other part; and that the plaintiff and his solicitor might be at liberty to inspect and take a copy of such deed, in the presence of *Mr. Bell*, of counsel for the said defendants James Swettenham and Mary his wife." No order made on the said motion; but ordered that the plaintiff do pay unto the defendants their costs of this application, to be taxed &c. Reg. Lib. B. 1819, fol. 206.

(*z*) *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66; *Burton* v. *Neville*, 2 Cox, 242; *Tyler* v. *Drayton*, 2 Sim. & St. 309; *Roper* v. *Roper*, cited 2 Myl. & K. 755.

(*a*) 2 Cox, 242.

tion (*b*). In several of these cases, both the reference and the admission which are alluded to by the court occur (*c*), and therefore they must still be considered to support the general principle, which is not affected by the judgment in this case.

The plaintiff has, without doubt, a right to see and to read every part of the answer of the defendant for which the bill has called. If the defendant does not answer, the plaintiff may except. If in the answer he refers to papers that are necessary to complete the discovery to which the case made by the plaintiff entitles him, but which, upon the common principle of convenience, are to be produced instead of being set out at length, there is no question that the production must be made. But, upon a mere *reference* to documents, the first inquiry seems to be, whether the reference is made as part of the answer to an interrogatory, and as pointing to a document which it is necessary should be seen to make the reply to that interrogatory perfect, or, whether the reference be made as to an instrument which is unconnected with the plaintiff's case, and wholly distinct from the discovery which is sought in support of that case. It seems deserving of consideration, whether the reference is attended with the same effect, whatever be the part of the answer in which it is introduced; and whether the language of those decisions, from which it has been sometimes inferred that a reference to a document

(*b*) 2 Myl. & K. 756.

(*c*) See 2 Myl. & K. 754, n. (b); *Spark* v. *Montriou*, 1 Y. & Coll. 103; 2 Myl. & K. 749.

in the answer necessarily incorporates it for the purpose of discovery, must not be understood to apply only to that part of the answer which the plaintiff has called for in support of his alleged title.

There is a remarkable peculiarity in the pleadings in equity, which distinguishes them from all other systems of pleading, and even from those that are formed upon the same model. This peculiarity consists in the double office which is performed by the *answer*. The answer in equity, when it is other than of that partial kind which has been considered in another place (*d*), not only contains the result of the examination of the defendant which the plaintiff has required by his bill, but it also contains the matter upon which the defendant founds his resistance to the claim. In the Ecclesiastical courts, where the defendant is likewise required to make an answer or discovery upon oath, the *answer* is an wholly distinct instrument from the *responsive allegation* which contains the defence. The term *answer* is sufficiently appropriate in either signification. Nothing is more common than the use of this term both in the sense of that which is said in return to a question, and in confutation of a charge; and nothing would be more illogical than to apply the same reasoning to an *answer*, without regard to these diverse senses. It becomes an important question, whether the circumstance that this instrument performs two offices, which are separate in themselves, and both of which

(*d*) Part I. Chap. II. p. 25.

are accurately described by its name, has produced the effect of confounding, in the language of our courts of equity, an essential distinction, that prevails in every other place, and upon all other subjects to which language is applicable. It cannot be disputed that the term *answer* is used in the courts of equity in both of the senses which are attributed to it; and it seems to follow as a necessary consequence, that in all arguments or judgments in which it occurs, the first question is, in which of these senses it is applied.

In *Atkyns* v. *Wright* (*e*), the defendant denied the fraud and culpable conduct with which he was charged in the bill, and admitted the possession of the deeds adverted to by the plaintiff: he then stated that a subsequent general release of all claims whatsoever had been made, "as in the said indenture when it should be produced would appear," with an admission, sufficiently distinct upon a fair construction, that the deed was in the possession of one of the defendants. Lord Eldon said, "he must produce that instrument at the hearing of the cause; but his answer means only that in this stage he does not put his defence upon a plea with *profert;* stating merely that there is such an instrument, which is to be his defence, if he shall produce it; not otherwise. My opinion is, that, upon this bill and answer, the plaintiff cannot compel the production in this stage of the cause." The observations in the same case,

(*e*) 14 Ves. 213.

which appear equivocal, are explained, if they may be understood to refer to deeds and instruments forming a part of the discovery for which the plaintiff has a right to call in support of his case, applying the term *answer* in its first sense. In *Marsh* v. *Sibbald* (*f*), the only question offered to the court was upon the production at a trial of documents that had been previously elicited by a bill, and it cannot be doubted, that the observations of the lord chancellor were made in reference to papers which constituted strictly a part of the discovery. In *Evans* v. *Richard* (*g*), it is clear, from the statement of the case, that the documents were connected with the account to which the plaintiff was entitled. The observation of Lord Eldon, in another case (*h*), "that it is not the mere reference that makes the document part of the answer for the purpose of production," has been explained to refer to the necessity of an admission of possession (*i*), and this is probably the true explanation; for his lordship adds, that, "by amending the bill and addressing further questions, the plaintiff may perhaps compel the defendant to make those documents part of the answer for that purpose." There is, however, sufficient ground to contend, that the discovery of unimpeached instruments upon which the defendant relies was not regarded by the lord chancellor as a consequence of the reference, even coupled with the admission. Ad-

(*f*) 2 Ves. & B. 375.
(*g*) 1 Swans. 7.
(*h*) *The Princess of Wales* v. *The Earl of Liverpool*, 1 Swans. 121.
(*i*) 2 Myl. & K. 753, in arg.

verting to the cases which turn upon the question of title, his lordship said:—"In *Bettison* v. *Farringdon* (*k*), to a bill for relief, the defence was, that a recovery had been suffered which barred the plaintiff's right, and the answer referred to a lease and release making a tenant to the *præcipe*, and leading the uses of the recovery; on motion, Lord Talbot ordered the production of the deed, merely on the ground of that reference in the answer, assigning as his reason, that, as it must be produced at the hearing, it ought to be produced on motion. Subsequent cases appear to question that doctrine on *both* its points. In *Lady Shaftesbury* v. *Arrowsmith* (*l*), and in *Burton* v. *Neville* (*m*), the court held that the plaintiff has a right to call for the instruments creating the estate tail under which he claims, but expressed great doubt whether he can call for the *instrument on which the defendant frames his title* (*n*)." In another passage of the same judgment, his lordship saves this class of documents from the effect of the principle which he states with regard to production. "The general doctrine of the court, as now settled, I take to be this: that, when a bill is filed, it will depend entirely on the manner in which the defendant expresses himself with respect to any instrument *for which the plaintiff may have a right to call*, whether the plaintiff can compel from that defendant production on mere motion. If the defendant states in his answer that there was such a

(*k*) 3 P. Wms. 363.
(*l*) 4 Ves. 66.
(*m*) 2 Cox, 242.
(*n*) 1 Swans. 121.

deed, *though the plaintiff may have an interest in its production,* it seems of late settled that that is not enough, but that he must in some way fix the defendant with possession of the deed." If the effect of the reference were not governed by the nature of the instrument, the words in this passage, which are quoted in italics, would be superfluous.

In the concluding part of the judgment of the lords commissioners, in the case of *Hardman* v. *Ellames* (*o*), it was said:—" It would be a strange thing to say that the defendant should, at the hearing, have the advantage of other parts of the deed than those set forth in the answer, and that the plaintiff, who looks to the answer for information, should not be at liberty to avail himself of the knowledge of the deed. It seems to be consistent with justice, that, if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the defendant's answer as he thinks fit. It is to be observed, also, that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth."

This passage applies in its full force to all documents which are shortly stated in answer to the questions of the plaintiff respecting their contents, and with a view to discovery (*p*). If it should be construed

(*o*) 2 Myl. & K. 758.

(*p*) It is presumed that the defendant may, in all cases, so far as the right to discovery extends, substitute the production of an instrument, in place of stating

to apply to documents which are so stated exclusively in the defence, it might be an important question, whether a new principle is not involved in the decision. The production of the evidence of one party for the purpose of examination by the other before trial, has not been compelled, except upon very special grounds, either at law or in equity. Such a right, if it exists, would seem to be wholly foreign to the principle upon which the court proceeds in compelling a discovery by the defendant of the evidence of the *plaintiff's case.* But, as it is submitted that the judgment of the lords commissioners is not founded upon the single ground of a reference or short statement of the deed having been introduced, it is unnecessary to pursue an inquiry which would only arise if that had been the effect of the decision.

SECTION 6.

Of the Cases in which the Oath of the Defendant is Conclusive upon the Effect of the Evidence withheld.

The power which the court possesses to compel discovery and to administer relief is manifestly distinguished by the circumstance, that, in the former

it at length. See the observations of Lord Eldon, 14 Ves. 213, as to the former practice. "Being in the office, the effect is the same as if they were stated in *hæc verba* in the answer."—1 Swans. 8; Mos. 57.

case, the court is entirely dependent, in the first instance, upon the oath of the party. The court neither asserts, nor has it the means of exercising any inquisitorial jurisdiction beyond the appeal to the conscience of the defendant, and the legal sanction opposed to a deviation from truth. With the qualifications which have been discussed in the preceding pages, it is a general rule that the defendant may be compelled to confess or deny upon oath his knowledge of every circumstance alleged by the plaintiff concerning the matter in question, and to state what papers and writings are in his possession relatiug to it. The court can do no more than compel an answer. If the defendant denies the circumstances which are charged, or that he is in possession of any writings relating to the subject, that denial is necessarily conclusive upon the question of discovery, and the plaintiff must be left to prove his case by such evidence as he can adduce. There may be reason to suspect that the defendant has not made a full disclosure, but the court has no power to investigate that question. Where the discovery was of a correspondence which had passed between the defendants and others, and some of the letters referred to other letters which were not set out, it was argued that that circumstance afforded ground for suspecting concealment and fraud; but it was said by the court:—"The defendant swears to have produced extracts of every thing relating to these bills: the other parts of the letters are not relating to them: they have sworn at their peril, but very fully;

and we cannot order a production of the other correspondence, as we have no inquisitorial authority to investigate all the other transactions of these merchants (*q*)." And the instance of books of account was mentioned, in which the defendant is permitted to seal up those parts that he states upon oath are immaterial. In all these cases, it is obvious that the oath of the defendant must be conclusive. He denies the *existence* of any evidence; and there is, therefore, no subject with which the court can deal.

When the defendant in his answer admits that there are documents in his possession relating to the matters in dispute, a different question is presented. Thus, supposing the discovery were sought of a correspondence, the oath of the defendant would be necessarily conclusive upon the fact, that the extracts of letters which he set out contained the whole that related to the subject; but if the defendant admitted that the other parts of the letters also related to the subject, but tended to sustain his own case and not the case of the plaintiff, it is a different proposition, to say that the court will hold the plaintiff bound by this discovery. The material passages which are not disclosed may explain those which are discovered; and it may not be safe to depend upon the interpretation of the party interested (*r*). The admission of relevancy has created a subject-matter with which the court can deal; and the inquiry is, by what means the court can be so satisfied of the nature and

(*q*) *Campbell* v. *French*, 1 Anst. 59.

(*r*) See *Gardiner* v. *Mason*, 4 Bro. C. C. 480.

effect of the evidence withheld, as to be enabled to decide that the plaintiff is not entitled to the production.

It is obvious that there must be some description of the documents before any question of production can arise (*s*). Before the court can be in possession of materials upon which to decide that the document ought not to be produced, it must be assumed that the description of the document in the answer is accurate in point of *appellation*, and just with regard to the *tendency or effect* which is attributed to it. The describing of the documents by distinguishing appellations is necessarily the office of the defendant. If the evidence be described to consist of *books of account* during a particular period—*books containing entries* of money payments in lieu of tithe,—*receipts* for money,—*letters* from some specified person,—*letters* of a certain date,—*indentures* of a certain date, and made between certain parties;—in all such respects it seems impossible, upon the question of production, not to assume that the appellations are correct. If the documents are numerous, and it be the object of the defendant to afford the smallest degree of information which the forms of the court will allow, there may be much scope for a disingenuous method of stating the documents in his schedule; but he must be a refined casuist who should distinguish between the conscientious obligations not to deny the possession of an instrument, which he in

(*s*) 14 Ves. 213; 6 Madd. 97; 2 Sim. & St. 311.

fact does possess, and not to describe it falsely. The description is of less importance when no protection is insisted upon, for the plaintiff may examine the documents themselves; but if they are brought by the description within some ground of protection which is claimed, the oath of the defendant must necessarily be conclusive upon the question whether the document shall be disclosed. If the defendant pledges his oath, that a certain letter is a communication from his solicitor upon the subject of the identical suit, the production cannot be ordered for the purpose of deciding whether the description be true. In this case the defendant has stated a positive fact, which the simplest effort of his powers of perception qualifies him to prove, and the admission of his oath as conclusive proof of this fact is not a greater reliance upon his testimony than is involved in the principle upon which it is admitted to be conclusive as to the fact, that a relevant document does or does not exist. The description being taken to be true, the protection is the necessary consequence.

The instance, however, which is adduced from the conclusiveness and effect of the appellation given by the defendant to the documents, when the protection is claimed on the ground of confidence, is not parallel with the case of a discovery which is resisted on the present ground. In order that the description of the document may be sufficient to enable the court to pronounce that the evidence is exclusively the evidence of the defendant, it must not only be correctly named, but its result or effect must be justly

weighed. This often involves much more than a simple effort of perception. It may require the exercise of an unprejudiced judgment, qualified for the task by experience and erudition. It would seem that, without extending the general principle of discovery, or encroaching upon the protection of the defendant's evidences, cases may arise in which the court, looking to the case made out by the bill, and to the description given by the defendant of documents which he admits to be material, would hold the nature and tendency of the documents to be so dubious, that they might possibly support the plaintiff's case, notwithstanding the opinion of the defendant to the contrary, and would therefore direct their production.

In the answer to a cross bill in support of a modus set up as a defence in a tithe suit, the defendant admitted that he was in possession of *books* containing entries of money payments corresponding with the sum stated as a modus; but he insisted, that, so far as they concerned the matter in dispute, they were evidence for him, and not for the plaintiff. Alexander, C. B., remarked, that it appeared clearly by the answer to the cross bill, that the defendant was in possession of documents relating to the subject-matter of the defence to the original bill. "If," he observed, "they furnish evidence of payments of this modus, they become material to the plaintiff's case. They must necessarily be evidence in every tithe cause which prays an account, as the principal question between the parties; for, if they tend to esta-

blish the modus, they would operate to affect very materially the general question—the amount of what should be due; and whether they were public or private property, if they would shew any fact, and were within the control of the party, they must be produced on the principle of the general rule (*t*)." Graham, B., in the same case, says:—" The defendant admits he has books, in which are entries relating to the payment of the sum said to be a modus; but, he adds, they furnish evidence for him, and not for the defendant. If parties were allowed thus to put their own construction upon the effect of the documents sought to be produced as evidence, so as to bind the plaintiff in such a bill as this, he would have but little chance of obtaining a discovery of the evidence by filing a bill. The moment that the defendant admits that he has books in his possession relating to the payment of the sum set up as a modus, he admits that he has in his possession documents which may be material to the plaintiff's case as defendant in the original suit; and he becomes entitled to call upon the court to exercise the power which it possesses to compel their production, in order that he may have the benefit of a full disclosure. It is for the court, when they shall be produced, to say what effect they may have as evidence in the cause (*u*)." The order for inspection was limited to the entries in the books which related to the money payments relied on by the defendant,

(*t*) *Firkins* v. *Lowe*, 13 Pri. 199. (*u*) S. C. Id. 200.

as the modus on which he rested his defence to the original bill. In another suit, where the plaintiff moved for the production of a tithe collector's books in the hands of the defendant, the rector, and the answer denied that they would in any manner assist or make out the plaintiff's case, Lord Lyndhurst said, " they are stated to relate to the matters in question, and it does not seem to me sufficient to say, that they will not assist the plaintiff's case. That must be matter of opinion, and may depend on the way in which they are used. *Firkins* v. *Lowe* has disposed of the question, and I see no ground to differ from the opinion of the majority of the court in that case. Suppose the books were produced at the trial of an action at law, and it appeared that some of the entries made in favour of the vicar or the occupier, the court would make some arrangement for the cause to stand over until the jury should have an opportunity of looking at the other entries. If this were not to be done, there would be very great injustice (*v*)."

The cases mentioned in the preceding section, where the defendant has used expressions of uncertainty in describing the documents, fall under the same principle,—that the court is not so satisfied, by the answer, of the result or effect of the documents in question, as to pronounce that they may not tend to establish the case of the plaintiff. Where the

(*v*) *Newton* v. *Beresford*, 1 Younge, 382. See *Gardiner* v. *Mason*, 4 Bro. C. C. 479; *Rotherham* v. *Saunders*, Tot. Trans. 8.

question was upon the right of nominating the minister of a chapel, Lord Macclesfield said:—"As to the motion, that the plaintiffs should produce the vestry books before a master, since they, in their answer to the cross bill, refer thereto, and by that means make them part of their answer, referring to them, as it is said, for fear of a mistake; for that reason, the court ought to let the defendants see them; otherwise, there would be no relying upon the answer of those who are thus guarding themselves by references for fear of a mistake, and to avoid exceptions in their answer (*w*)."

It has been observed, that the case of *Hardman* v. *Ellames* (*x*) seems to have proceeded chiefly on the ground that the defendant coupled his statement of the documents with expressions guarding himself from the consequences of a positive allegation as to their effect. The defendant said that the documents related to and made out his own title to the estates in question, and did not, according to the best of his information and belief, shew or tend to shew any title in the plaintiff. The question then arose,—how far the effect of this declaration was removed by the reference *for greater certainty* in that part of the answer in which the defendant professed to state what was the effect of the documents. The principle, seems to be expressed in this passage of the judgment:—"It was said, in the present case,

(*w*) *Herbert* v. *Dean and Chap. Westminter*, 1 P. Wms. 775.

(*x*) *Ante*, p. 214, 216. "What you barely know or believe is not sufficient:"—*per* Lord Hardwicke, 1 Ves. 38.

that the document ought not to be produced, because it only manifests the defendant's title; but the answer to that is, in the first place, that it may, by possibility, do something more than merely manifest the defendant's title." And the court held, that where a document is shortly or partially stated in the answer, and the defendant, "for the sake of greater caution, refers to the document in order to shew that the effect of the document has been accurately stated, in such a case the court will order the document to be produced (*y*)."

In the cases where the court has not permitted the defendant's oath to be conclusive, there have been admissions in the answer that the document contained evidence which the court might regard as illustrative of the plaintiff's title (*z*); or, expressions importing that the defendant would not undertake to declare what the legal effect of the document was, although he insisted that the court should rely upon his opinion, so far as he thought proper to declare an opinion (*a*); or such a description of the document in point of appellation as was sufficient, upon the defendant's own shewing, to make it clear to the court that he was in possession of a document which was necessarily of a dubious tendency in reference to

(*y*) *Hardman* v. *Ellames*, 2 Myl. & K. 758. The effect of the reference *for greater certainty* in a bill seems to be the same: see the case mentioned in the argument for the plaintiff, 1 Swans. 117.

(*z*) *Firkins* v. *Lowe*, 13 Price, 200.

(*a*) *Herbert* v. *Dean and Chapter of Westminster*, 1 P. Wms. 775; *Hardman* v. *Ellames*, 2 Myl. & K. 745.

the question in dispute, and the effect of which therefore could not be trusted to the judgment of the party interested (*b*).

The court must undoubtedly rely upon the oath of the defendant in all questions of discovery, until an admission be obtained of his possession of certain documents, which are or may be material to the case of the plaintiff. In this stage of the inquiry the declaration of the defendant must be trusted, however grave and important the considerations which it involves, and whatever qualities of mind may be required to form a correct judgment. "The defendant," it was in one case said by Lord Rosslyn, "must give himself the trouble of inspecting the deeds, and answering upon oath whether they *create an entail* or not (*c*)." In this case the deeds of entail were the only deeds in which the plaintiff could, by possibility, have any interest. The same principle of necessity intrusts to the defendant the selection of letters and papers tending to prove a particular agreement, or to shew at what time a possession became adverse (*d*), or to establish other facts equally the result of circumstances upon which there may be great difference of opinion.

In such cases the court has no other alternative than to bind the plaintiff by the declaration of the defendant, or to destroy the protection afforded to evidences with which the plaintiff has no concern.

(*b*) *Newton* v. *Beresford*, 1 Younge, 382; *Gardiner* v. *Mason*, 4 Bro. C. C. 479.

(*c*) 4 Ves. 71.

(*d*) 1 Mer. 126.

Is this, however, the established principle upon which the jurisdiction must be exercised, or is it an inevitable infirmity belonging to it? The barrier which is raised for the protection of honesty and integrity, may prevent the machinery of justice from penetrating the recesses of fraud and falsehood. But it does not seem to be necessary, when a case of doubt arises, which may be investigated without endangering the general protection, that the court shall then be bound to pronounce its judgment in the absence of that investigation, because there would have been no other course if the means of examination had not been within its reach

Section 7.

Of the Effect of a Submission in the Answer to produce Documentary Evidence.

The question whether a document shall be produced is merely a question as to the evidence to be elicited. If the defendant in his answer makes an unqualified submission to produce documents, it seems that he will be bound by that submission (*e*). If the defendant admits that he has a deed in his possession and is ready to produce it, if the court should require him to do so, he does not by that form of pleading enable the court to dispense with

(*e*) 14 Ves. 213; 9 Price, 642.

the judicial discretion not to order the production, if it should not be thought proper to make it (*f*). And it has been said, that where a general production of deeds has been ordered, the order has commonly proceeded upon the defendant's submission (*g*).

It has frequently been a subject of observation by the court, on the question of producing papers, that there has been no submission on the part of the defendant to produce them (*h*). There does not, however, appear to be any case in which this circumstance has afforded a ground for withholding documents, to the discovery of which the plaintiff would have been otherwise entitled upon the general principle.

Section 8.

Of the Production of Deeds or Instruments which are Impeached.

If the object of a suit be to set aside or destroy a deed or instrument, a difficulty seems to have been felt in determining whether the deed or instrument so impeached, ought to be viewed in the light of a

(*f*) *Atkyns* v. *Wright*, 14 Ves. 213; 2 Ves. jun. 462; *Smith* v. *Duke of Northumberland*, 1 Cox, 364; *Fenwick* v. *Reed*, 1 Mer. 123; *Sir W. Stanhope* v. *Roberts*, 2 Atk. 214.

(*g*) *Campbell* v. *French*, 2 Cox, 288.

(*h*) 2 Myl. & K. 756; 14 Ves. 213.

title deed (*i*). And it has been contended that the deed in such a case is not within the rule which protects the defendant's evidences (*k*). This may be, perhaps, inferred from the observations of Lord Eldon, where the bill sought to set aside indentures of conveyance of an estate. "Where the object of the suit is to destroy the deed, the plaintiff has a right to have it produced and left in the hands of the clerk in court for the usual purposes of inspection, &c.; as from the right to have it set forth in the answer, the consequence follows, that the instrument itself should be before the court at the hearing." On another occasion, however, his lordship observes—"where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and no lien can protect the defendant from producing it, for it is the object of the suit that the deed may be declared a nullity. A considerable question however may arise at what *period* of the cause the production can be compelled (*l*)."

There are two principles upon which the court proceeds in making interlocutory orders for the production of documents:—security pending litigation, and discovery for the purposes of the suit (*m*). In the consideration of a leading case upon this point,

(*i*) 16 Ves. 441. See 6 Sim. 7; 14 Ves. 214.

(*k*) *Codrington* v. *Codrington*, 3 Sim. 52 2.

(*l*) *Balch* v. *Simes*, 1 Turn. 92.

(*m*) *Lingen* v. *Simpson*, 6 Madd. 290. Another principle seems to have been recognised in *Sparke* v. *Montriou*, 1 Y. & Coll. 110.

the two principles are blended: the object of the bill having been the safe custody of the deeds. "Whether," said Lord Eldon, "these instruments are to be considered as title deeds or not, it is clear that where the object of the bill is to set aside the grant, the court must have the power of so dealing with the instrument as to be reasonably sure of having it produced upon all occasions when its production may be necessary. That sort of title deed must therefore be produced for the purpose of being proved before the examiner;—if necessary for the discovery of its contents;—and must be produced at the hearing if necessary: but the court does not take the custody of it in the interval without a special case (*n*)." His lordship held, that upon the motion there could be nothing more than an order for the production of the instruments at the hearing. An order in another case was made for a delivery to the plaintiff personally, or to her clerk in court, at her option; and it proceeded on the ground that where a person executes a deed in favour of her solicitor, and reserves to herself a life interest and a power of revocation, it is impossible for the solicitor to refuse to produce the deed, and that it is his duty to leave a counterpart of it in the hands of his client (*o*). And a voluntary deed, alleged to have been obtained from a person of unsound mind, has been ordered to be produced for the plaintiff's inspection after publication had passed (*p*).

(*n*) *Beckford* v. *Wildman*, 16 Ves. 442; 1 Swans. 125.

(*o*) *Balch* v. *Symes*, 1 Turn. 92.

(*p*) *Fencott* v. *Clarke*, 6 Sim. 8.

Where it was alleged that the plaintiff executed the deed under an impression that it was a power of attorney;—that when she signed the receipt on the back of the deed, it was folded down so that she could not see what she was signing;—and that the fraud practised in procuring her signature would appear on inspection of the deed—it was ordered to be produced (*q*). This case, however, cannot be considered as an exception to the general rule, for the *patent* evidence of fraud which it was alleged the deed would exhibit, rendered it, to the extent of that charge, the evidence of the plaintiff. It may be doubtful, indeed, whether any of the present cases constitute exceptions to the general rule: but, inasmuch as they involve some considerations which do not arise in other cases, it seemed proper to treat them as a distinct class.

It seems to be decided, that where it appears by the description of a particular instrument, that it is evidence not of the title of the plaintiff, but of the defendant, the circumstance that the bill is brought to set aside that instrument on the ground of fraud, does not entitle the plaintiff to a production of it (*r*), unless there are otherwise special grounds for that production.

(*q*) *Kennedy* v. *Green*, 6 Sim. & St. 310. See *The Princess of Wales* v. *The Earl of Liverpool*, 1 Swans. 114.

(*r*) *Tyler* v. *Drayton*, 2 Sim. 8.

SECTION 9.

Of the Practice where Part of a Document in the possession of the Defendant relates to the Subject in Question, and another Part of the same Document is Irrelevant.

The principles which have been stated in the preceding part of this chapter, frequently require the adoption of some peculiar rules of practice, in regard to their application. It may often happen that the plaintiff is entitled to a discovery and inspection of some entries in a book, or some passages in a letter, or other document, and has no concern with the other parts of the book or document. In such cases the proper course for the defendant, upon motion for the order for production or inspection of the papers, is to state the existence of passages to the discovery of which he objects; and the order is then qualified as to those passages (*s*), by adding to the direction, that the documents admitted to be in his possession be left with his clerk in court, that the defendant is to be at liberty to seal up on oath such parts of the said documents as do not in any manner relate to the plaintiff, or to the matters in question in the cause (*t*).

If the discovery be sought of letters, and the de-

(*s*) *Jones* v. *Powell*, 20th Nov. 1816, 1 Swans. 535, n. (*b*).

(*t*) See forms of orders, in *Gerard* v. *Penswick*, 1 Swans. 535; *Garland* v. *Scott*, 3 Sim. 397; *Hughes* v. *Biddulph*, 4 Russ. 192.

fendant set forth extracts of the letters and pledge himself by oath that those are the only parts of the correspondence relating to the subject, the plaintiff is entitled to no further discovery of the letters (*u*).

It has been held, that where a person who is bound to keep separate accounts shall unite them with others, he must produce the whole. It was said by Lord Eldon, in a case before him, that, "as to the part of the motion, with respect to bringing the books into court, it is a case of some novelty and difficulty; but all the difficulty is out of the question with reference to an executor. It is, and must be understood to be, the bounden duty of an executor, to keep clear and distinct accounts of the property which he himself is bound to administer; and I have not the slightest difficulty in saying, that if all these books were the books of a banking-house in London, and an executor thought proper to put the accounts of a testator's estate into his banking books, he shall not be allowed to tell me, the *cestui que trust,* that I have no right to see his original accounts of my property. To an executor so acting I should say, they shall see every part of these original books which contain any part of this transaction. The case would be a case of greater nicety with respect to the partners of an executor who had permitted him to place in the general books his accounts as executor. I should say, upon the mere fact of their

(*u*) *Campbell* v. *French,* 1 Anst. 58; *Walpole* v. *White,* cited 1 Bro. C. C. 471.

having so permitted him, that this court would not allow them to withhold a free inspection of the books; and I should say it was clearly due in a case in which the executor alleges that he may have lent to them money, part of the testator's estate, at interest, on a loan between him and them, and where the executor says they have been dealing with it, by laying it out on securities (*v*)."

(*v*) *Freeman* v. *Fairlie*, 3 Mer. 43; *Earl of Salisbury* v. *Cecil*, 1 Cox, 277.

PART IV

CHAPTER I.

OF THE RULE IN CHANCERY THAT A DEFENDANT WHO HAS SUBMITTED TO ANSWER THE BILL MUST ANSWER FULLY.

SECTION 1.

Of the Origin of the Rule, and of the Temporary Deviations from it.

IT is a rule that a defendant must answer fully all the allegations and charges in the bill, and all the interrogatories founded upon and incidental to them, from which he does not specifically protect himself by demurrer or plea.

This was the ancient course of the court of Chancery (*a*). "The old rule before the time of Lord Thurlow," said Lord Eldon, "was either to demur, to plead upon something *dehors* the bill, or that sort of negative plea of which we know more in equity than at law, or to answer throughout (*b*)." During

(*a*) *Richardson* v. *Mitchell*, 8 Vin. Ab. tit. Discovery, D. pl. 6, n.; *Edwards* v. *Freeman*, Ib. Sel. Ca. in Cha. temp. Lord King, 51; *Stephens* v. *Stephens*, (*b*) 16 Ves. 387; 11 Ves. 306.

a period which occupies an extensive and important place in the equity reports;—from the time of Lord Thurlow to the later years of Lord Eldon;—there existed a practice at variance with this rule. It will be necessary to notice the mutations in this practice, in order to explain and assign to their proper places the various judgments which were pronounced whilst it continued; and this notice will be fitly introduced by adverting to the reasons upon which the rule is founded.

Immemorial practice has assigned to the masters in Chancery the duty of determining upon the sufficiency of answers (*c*). This is done by a reference to the master, who reports upon the exceptions which are taken. The judgment of the master is thus in the shape of a certificate to the court upon the *fact* referred to him, and the propriety of his decision may be questioned by excepting to the report. If an objection to answering be taken by demurrer or plea, the judgment of the court is given in the first instance, for the validity of a demurrer or plea is never referred to the determination of the master. The question reserved to the court is mainly, though not wholly, one of law; whilst the question left to the master is chiefly, though not entirely, matter of fact (*d*).

The rule now under consideration is a conformity of the pleading to the practice, which is necessary to avoid much *inconvenience* and *inconsistency* in the

(*c*) See *West* v. *Lord Delaware*, 1 Vern. 74.

(*d*) Immateriality is obviously a question which involves considerations of law.

proceedings of the court. Lord Eldon recapitulated the *inconvenience* of introducing what he terms a species of plea which is not a plea, answer, or demurrer, but a little of each (*e*). The suitor was first put to the expense of the judgment of the master upon the exceptions to the answer; and the master was called upon to give judgment in a matter which, with the exception of the case of pain, penalty, and forfeiture, it is not the habit of the court to intrust to him. It was then brought before the court upon exceptions to the report; and, supposing a fact to be stated in the answer and relied upon as a bar to a discovery of particular matters, it often happened that issue could not be joined upon the single fact supposed to be the bar, but the plaintiff, if he replied, was obliged to reply to the answer as he found it. The commission went to a great variety of facts instead of one, as on a plea;—and the plaintiff is put to a long expensive proof;—an unnecessary and vexatious burden upon him (*f*). The answer was previously understood to be *primâ facie* an admission that the defendant had no such short answer to the case which, being introduced by plea, would entitle him to a declaration in the first instance, whether he ought not to make any further answer; leaving the equity to be decided upon at the hearing (*g*). Remarking upon the *inconsistency* to which it would lead, Lord Eldon says, "this

(*e*) 11 Ves. 293.

(*f*) *Dolder* v. *Lord Huntingfield*, 11 Ves. 293; *Shaw* v. *Ching*, 11 Ves. 305; *Somerville* v. *Mackay*, 16 Ves. 387.

(*g*) *Rowe* v. *Teed*, 11 Ves. 378; *Somerville* v. *Mackay*, 16 Ves. 388.

court does not trust the master generally with the determination how much of the answer, considered as a plea, would be a good defence. The master is, therefore, almost under the necessity of admitting an exception, and when the propriety of his judgment comes to be argued here, it would be most incongruous that the court, admitting his judgment not to be wrong, should yet give a different judgment, considering the answer as a plea (*h*)."

The deviation from the general rule of practice seems to have grown out of the apprehensions entertained by Lord Kenyon of the consequences of compelling a defendant to answer, if he failed to protect himself by plea (*i*); and the desire of Lord Thurlow to assimilate the pleading in equity with that at law, which led him to interpose a difficulty to the admission of negative pleas, and left the defendant no alternative than to raise his objection by answer (*k*). The reference which was frequently made to cases in the Exchequer, where such a defence was permitted (*l*), and the denial by Lord Rosslyn of the authority of some decisions affirming the general principle (*m*), seems to have promoted the continuance of the practice thus introduced, and added to the discordant opinions on the subject (*n*). In none

(*h*) *Rowe* v. *Teed*, 11 Ves. 378.

(*i*) *Neuman* v. *Godfrey*, 2 Bro. C. C. 332, 334.

(*k*) See the cases cited, *ante*, p. 28, n. (*i*).

(*l*) *Jacobs* v. *Goodman*, 3 Bro. C. C. 487, n.; 2 Cox, 282, S. C.

(*m*) *Jerrard* v. *Saunders*, 2 Ves. jun. 457.

(*n*) See 11 Ves. 302.

of the cases, however, does the defendant appear to have been allowed by answer to resist the discovery of matters which might be evidence in support of the plaintiff's title to sue, distinguishing, by this expression, the title to sue from the extent of the claim. The rule stated in a late judgment is consistent with all the authorities, that a defendant cannot by answer deny the plaintiff's title, and refuse to answer as to facts which may be useful evidence in support of that title (*o*); or facts which the plaintiff insists, if fully disclosed, would establish his case (*p*). This distinction alone would remove a large majority of the cases in equity out of the reach of doubt with regard to this point.

The cases which have been principally discussed, are those where the defendant has denied the title of the plaintiff, and upon that denial has founded a refusal to set forth matters which would be useless to the plaintiff to establish his title, but would be necessary to ascertain the extent of his claim if it were established. This occurs where the discovery is a mere fruit or consequence (*q*) of the title, or separate from (*r*), and not evidence of the title itself. If a plaintiff claimed as a creditor (*s*), heir-at-law (*t*),

(*o*) *Mazareddo* v. *Maitland*, 3 Madd. 72.

(*p*) *Taylor* v. *Milner*, 11 Ves. 42; *Hornby* v. *Pemberton*, Mos. 58; *Jones* v. *Davis*, 16 Ves. 262.

(*q*) *Taylor* v. *Milner*, 11 Ves. 42. Sir W. Grant seems to have held the same, *Scott* v. *Mackintosh*, 1 Ves. & B. 503.

(*r*) *Hall* v. *Noyes*, 3 Bro. C. C. 489.

(*s*) *Phelips* v. *Caney*, 4 Ves. 106.

(*t*) *Gethin* v. *Gale*, cited Ambl. 354; *Gunn* v. *Prior*, cited *ante*, p. 28, n. (*i*).

or partner (*u*), and sought an account which could not be denied if he truly sustained such character, the defendant has been allowed to deny that fact, and to insist in his answer that he should not be compelled to render such an account, submitting to be examined upon interrogatories at the hearing, as he must of course be, if the plaintiff should prove the disputed fact (*v*). The rule collected from these authorities is stated by Lord Eldon to apply:—"If the bill is, by the plaintiff and defendant, allowed to give a right to the relief if true, the defendant not demurring, not denying by answer the title to relief upon the bill, but negativing one fact positively, says to the court, if they will take that fact not to be true, ought not to call for an answer (*w*)."

The authority of these cases was not directly opposed by any adverse decision until a very recent period. The court hesitated greatly to deny the propriety of such a defence, and sought rather to obviate the inconvenience which might result from it. It was first observed, that the defendant by this means deferred the account until after the hearing, which might be delayed by various causes; and, during that time, the plaintiff was exposed to the chance of any accident which might place the account wholly out of his reach: thus, it was said, the

(*u*) *Sir J. Cockburn* v. *Sir Lawrence Dundas*, cited 3 Ves. 447; *Marq. Donegal* v. *Stewart*, 3 Ves. 447.

(*v*) *Phelips* v. *Caney*, 4 Ves. 107; *Gethin* v. *Gale*, cited Ambl. 354.

(*w*) *Dolder* v. *Lord Huntingfield*, 11 Ves. 293.

defendant might die (*x*). To meet this objection, the court required to be satisfied, as speedily as might be, with respect to the truth of the disputed allegation, and usually directed an issue to try it (*y*). In some cases, bills calling for an account of tithes were excepted from the rule, and a creditor or legatee suing an executor was considered to be entitled to an account, although the debt or legacy was denied (*z*).

The court next required that the answer should have the semblance of a plea, if not in form, yet in precision. It must at least, said Lord Eldon, be brought forward by the answer as distinctly and positively as if it had been pleaded. "The principle I go upon is, that if they had not answered, but had pleaded in the terms in which they have answered, the plea must have been overruled (*a*)." The answer was required, clearly, positively, and unequivocally, to aver the fact upon which the defendant relied, that the question might fairly arise (*b*).

(*x*) 11 Ves. 76, 304; *Hornby* v. *Pemberton*, Mos. 58; *Sweet* v. *Young*, Ambl. 353. See *Gumley* v. *Fontleroy*, Bunb. 60; *Quilter* v. *Messendine*, Gilb. R. 228; *Leonard* v. *Leonard*, 1 Ba. & Be. 324.

(*y*) *Randal* v. *Head*, Hardr. 188; *Gunn* v. *Prior*, cited *ante*, p. 28, n. (*i*); *Anon.* at the Rolls, cited 16 Ves. 52.

(*z*) Hardr. 188; *Gethin* v. *Gale*, cited Ambl. 354; *Shaw* v. *Ching*, 11 Ves. 304; Ld. Red. Tr. 311: but see *Phelips* v. *Caney*, 4 Ves. 106. There is a distinction still subsisting, in that the admission of assets by an executor absolves him from the necessity of setting forth the account, whether the prayer be in the alternative or not.

(*a*) *Faulder* v. *Stuart*, 11 Ves. 303.

(*b*) *Somerville* v. *Mackay*, 16 Ves. 389.

Extending this analogy to pleas, the denial of title was required to be of one clear fact, or combination of circumstances, giving, as the result, one clear ground of defence (*c*). And, lastly, the principle upon which an answer to matters, that the defendant insists by plea he should not answer, overrules the plea, was applied to this form of defence; and the defendant was not allowed to make a partial discovery of matters of which he at the same time insisted the plaintiff was entitled to no discovery (*d*).

It would seem that Lord Eldon, whilst he confined himself to averting the inconvenience of the system of pleading which had obtained, was prepared in a case where the direct question should arise, to overrule the authorities upon which it was founded (*e*). "I should not," his lordship observed, "shrink from the decision of that question if it was fairly before me, and I should be relieved from the apprehension of an erroneous judgment, by the reflection that it is much better that there should be a decision than that such a point should remain in uncertainty. It is not my purpose, on this occasion, to repeat all that is to be found upon this subject in the late cases, but I must repeat, that whenever this question comes to a decision, it will be infinitely better to decide that in this court the objection should be made by plea rather than by answer (*f*)."

(*c*) See *Rowe* v. *Teed*, 15 Ves. 376, 379.

(*d*) *Somerville* v. *Mackay*, 16 Ves. 387.

(*e*) 11 Ves. 293, 302, 305, 306. See 2 Ves. & B. 161.

(*f*) *Rowe* v. *Teed*, 15 Ves. 377.

It is remarked by Sir John Leach, that in the subsequent case of *Somerville* v. *Mackay* (*g*), the point is not expressly decided; but he adds, "I remember during the argument the lord chancellor strongly expressed his opinion, that a defendant could not answer as to part of a bill, and refuse to answer the rest; and I think it so useful a rule, that I shall always adhere to it (*h*)." In a case which occurred soon afterwards, the plaintiff alleged a partnership, and prayed an account, and the defendant by answer denied the partnership and refused to set forth the account. The answer was excepted to for insufficiency, and the vice chancellor held, that the point was settled; that the defendant should have pleaded; but, if he answers, he must answer fully (*i*).

Section 2.

Of the Cases to which the Rule extends.

If the matter relied upon by the defendant constitute a defence to the *relief* which is sought by the plaintiff, whether that relief be at law or in equity; or if it be necessarily an objection which extends to the *purpose* of the bill, the defendant, in order to protect himself from discovery, must resort to a demurrer or plea; for, in such cases, if he should answer the bill, he will be compelled, upon the pre-

(*g*) 16 Ves. 383.

(*h*) *Mazareddo* v. *Maitland*, 3 Madd. 71, 72, and note (*b*).

(*i*) —— v. *Harrison*, 4 Madd. 252.

sent rule, to make a full discovery. If the defence be, that the plaintiff has no title to equitable relief (*k*),—that he has no interest in the subject (*l*),—that the defendant has himself no interest in the subject (*m*),—that he is a purchaser for a valuable consideration (*n*),—that the bill does not declare a purpose for which equity will assume jurisdiction to compel a discovery (*o*),—or that the plaintiff is under some personal disability by which he is incapacitated to sue (*p*)—it has been observed (*q*), that the defence necessarily extends to the entire subject of suit; and the case is strictly within the principle, that the defendant who submits to answer must answer fully.

With regard, however, to the case of a defendant, who denies or disclaims all interest, and therefore insists that he is a mere witness, and to that of a purchaser for valuable consideration, different opinions have been entertained upon the applicability of this rule, and contrary decisions have been pronounced.

"If a claim of interest is alleged by a bill against a person who has no interest in the subject, he cannot by a demurrer protect himself from a discovery,

(*k*) Part I. Chap. I. Sects. 3, 4, pp. 6, 11.

(*l*) Part II. Chap. I. p. 41; ——— v. *Harrison*, 4 Madd. 252; *Shepherd* v. *Roberts*, 3 Bro. C. C. 239.

(*m*) Part II. Chap. II. p. 63; *Cartwright* v. *Hateley*, 3 Bro. C. C. 238; S. C. 1 Ves. jun. 292.

(*n*) Part II. Chap. III. p. 89; *Ovey* v. *Leighton*, 2 Sim. & St. 234.

(*o*) Part II. Chap. V. p. 110; *Mountford* v. *Taylor*, 6 Ves. 791.

(*p*) Part II. Chap. VI. p. 121.

(*q*) *Ante*, p. 127.

and must resort either to a plea or disclaimer, by either of which means it should seem he may protect himself from making by answer that discovery which he may properly be required to make, if called upon as a witness (*r*)." Lord Redesdale adds:—" In some cases, however, the court has allowed a defendant to protect himself by answer, denying the charge of interest, from answering to matters to which he may be afterwards called upon to answer in the character of a witness; and, perhaps, in justice to those against whom he may afterwards be called upon to give evidence as a witness, he ought not to be previously examined to the same matters upon a bill, under the pretence of an interest which he has not (*s*)."

A decision of Lord Kenyon (*t*), and a sentence which appears to convey an opinion of Lord Rosslyn (*u*), are authorities for the proposition, that a defendant in these circumstances may by answer decline to answer fully (*v*); but there are several cases in which a defence so framed has not been allowed (*w*); and the modern practice appears to be in conformity with the general rule.

The examination in a bill is upon a series of *lead-*

(*r*) Ld. Red. Tr. 283, 188; 1 Ves. 426.

(*s*) Ld. Red. Tr. 283.

(*t*) *Neuman* v. *Godfrey*, 2 Bro. C. C. 332.

(*u*) 2 Ves. jun. 457.

(*v*) *Sweet* v. *Young*, Ambl. 353; *Jacobs* v. *Goodman*, 3 Bro. C. C. 487, n; S. C. 2 Co. 282, are cases in the Exchequer, where the present rule does not prevail.

(*w*) *Cookson* v. *Ellison*, 2 Bro. C. C. 252; *Cartwright* v. *Hateley*, 3 Bro. C. C. 238; S. C. 1 Ves. jun. 292; *Williams* v. *Farrington*, cited 3 Bro. C. C. 239; 11 Ves. 42, *per* Sir W. Grant.

ing interrogatories; and it is not impossible that a previous answer, as a defendant in equity, may be disadvantageous to those against whom the party should be afterwards produced as a witness; but this inconvenience would not perhaps be obviated by a relaxation in the rule of pleading. If the defendant be purely disinterested, the same indifference which would prevent him from incurring the liability to expense, from the bare possibility that his plea might be overruled, would probably prevent him from subjecting himself to the danger of expense from exceptions to his answer. If he does, in fact, possess an interest adverse to the plaintiff, there seems no ground to apprehend that the rule may be productive of injustice. The weight of authority is undoubtedly against the admission of this defence to discovery, in the shape of an answer, and the reasons which have been urged for regarding it as an exception to the general rule appear to be scarcely sufficient for that purpose.

The cases are not explicit as to the effect of a *disclaimer* upon the question of discovery. It is said by Lord Redesdale, that a disclaimer cannot often be put in alone; "for, if the defendant has been made a party by mistake, having at the time no interest in the matter in question, yet, as he may have had an interest, which he may have parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not; and if the defendant has had an interest which he has parted with, an answer may be also necessary to enable the plaintiff to make the proper party instead of the defendant disclaiming.

The form of a disclaimer alone seems to be simply an assertion that the defendant disclaims all right and title to the matter in demand, and in some instances, from the nature of the case, this may perhaps be sufficient; but the forms given in the books of practice are all of an answer and disclaimer (*x*)."

Where the disclaimer was by an accounting party, Lord Eldon observed, that, "as to the right of the plaintiff to an answer, a defendant cannot shelter himself from answering, by alleging that he has no interest in the matters of the suit. Though he has no interest, others may have an interest in it against him. He may be deeply accountable; and the very statement that he is deeply accountable, may, in one sense, be an allegation that he has no interest in the suit. A man cannot disclaim his liability (*y*)."

The other ground of defence upon which doubts have arisen with regard to the application of this rule, is that of a purchase for valuable consideration without notice. Where a plea had been overruled as defective, and the defendant then stated the objection by answer, Lord Rosslyn expressed himself "perfectly satisfied upon the general reasoning, that this court will never extend its jurisdiction to compel a purchaser, who has fully and in the most precise terms denied all the circumstances mentioned as circumstances from which notice may be inferred, to go on to make a further answer, as to all the cir-

(*x*) Ld. Red. Tr. 318, 16. 110. See Choyce Ca. in Cha. 11; 1 Younge, 252; 1 Russ. & Myl. 2 Russ. 462.

(*y*) *Glassington* v. *Thwaites*,

cumstances of the case, that are to blot and rip up his title. To do so would be to act against the known established principles of this court." And his lordship accordingly decided that the answer was sufficient (*z*).

It would appear that the case of a purchaser was not formerly excepted from the general rule (*a*); and it has been held by Sir John Leach, that a purchaser, submitting to answer, and not protecting himself by plea, must answer fully (*b*).

It was in one instance suggested, that the circumstance of a bill being clearly demurrable might constitute an exception to the present rule. It had been necessary to apply for leave to file exceptions to the master's report of insufficiency. Sir T. Plumer, V. C., held the merits of the case to be clearly in favour of the defendant, but, in granting the motion, observed, that the great difficulty in maintaining the exceptions to the master's report would be upon the cases in which it has been determined, that, if a defendant has answered in part he must answer the whole of the bill; but, in all those cases, there was this feature belonging to them—they were all bills in which, if taken to be true, the plaintiffs were entitled to relief; but, in the one before him, a case

(*z*) *Jerrard* v. *Saunders*, 2 Ves. jun. 458. The case of a purchaser is mentioned as an exception to the rule by Lord Eldon, 15 Ves. 378, and by Lord Chancellor Manners, 1 Ba. & Be. 326.

(*a*) *Richardson* v. *Mitchell*, Sel. Ca. in Cha. temp. Lord King, 51.

(*b*) *Ovey* v. *Leighton*, 2 Sim. & St. 235; 11 Ves. 287, 291.

certainly of great novelty and worthy of grave argument, it appeared to him the plaintiffs were not, on the face of the argument, entitled to relief, and that it might have been demurred to; and, taking it to have been a demurrable bill, the question would be, whether, having partly answered such a bill, the defendant was bound to answer the whole (*c*). No authorities appear to sanction the proposition, that the answer may be supported, because the defendant might have demurred (*d*). A bill may be demurrable for want of parties, yet, however plainly that defect might appear, the objection cannot be taken when the mere question is the sufficiency of the answer. "The proposition," said Lord Eldon, "is extraordinary, that a person in a situation in which he must answer, and may and is sometimes called upon to state the want of parties, can say that, as the suit hereafter cannot be effectual for want of parties, he will not answer at present. I do not understand the principle of that (*e*)." There can be no intelligible distinction in the degree of clearness with which the bill might be pronounced demurrable; and to exclude the operation of the rule where a demurrer could have been sustained, would let in all the inconvenience and inconsistency which the rule is designed to avert. It is contrary to the principle expressly laid down, that the question on

(*c*) *Noel* v. *Ward*, 1 Madd. 343.

(*d*) See *Dolder* v. *Lord Huntingfield*, 11 Ves. 294, 295; *Somerville* v. *Mackay*, 16 Ves. 385.

(*e*) *Dolder* v. *Lord Huntingfield*, 11 Ves. 293.

exceptions cannot be whether the plaintiff has shewn a case for equitable relief: the only question is, as to the sufficiency of the answer (*f*).

The demurrer or plea in the foregoing cases is not merely a defence against a particular discovery, but is directed to the entire claim of the plaintiff to the subject in dispute; any answer will therefore overrule the demurrer or plea (*g*), except it be confined to special allegations in the bill calling for discovery in proof of the plaintiff's title (*h*). This is a rule of pleading, but it marks the distinction between general and special objections to answer.

Section 3.

Of the Exception to the Rule where the Discovery might subject the Defendant to Penalty or Forfeiture.

The cases in which a defendant may protect himself from discovery, on the ground that his answer might be evidence tending to subject him to penalty

(*f*) *Mazareddo* v. *Maitland*, 3 Madd. 71. But see Ld. Red. Tr. 200.

(*g*) *Tidd* v. *Clare*, Dick. 712; *Noel* v. *Ward*, 1 Madd. 322; *Jones* v. *Pengree*, 6 Ves. 585; *Blacket* v. *Langlands*, 1 Anstr. 14; *James* v. *Sadgrove*, 1 Sim. & St. 6; *Thring* v. *Edgar*, 2 Sim. & St. 274; *Watkins* v. *Stone*, 2 Sim. & St. 573; *Corbett* v. *Hawkins*, 1 Y. & J. 421; 1 Ves. 57; 3 P. Wms. 81; *Ruspini* v. *Vickery*, 1792, cited Ld. Red. Tr. 211, n. (a).

(*h*) See Part I. Chap. II. p. 25.

or forfeiture, are excepted from the present rule (*i*). Here the defendant may protect himself from answer, submitting that he is not bound to answer farther (*k*). Lord Eldon adverts to this objection as one of the questions which is submitted to the judgment of the master (*l*); and where, therefore, the admission of this form of defence is not attended with the inconvenience and inconsistency that are produced by a general departure from the rule. It would seem that it is proper to insist upon the protection in the form of an answer, where a demurrer would admit the facts to be true (*m*).

A distinction has been suggested where the penalty arises from a bye-law, or from some circumstance of which the court has no judicial knowledge. A question was stated to involve a liability to forfeiture under a regulation of the East India Company; and Lord Eldon said, that, if a bill had been filed by the company against a defendant, raising the question, "it would not have been sufficient for the defendant to state on the record that he could not make the discovery without exposing himself, or giving an answer that would have a tendency to expose him to penalties, the court having no judicial knowledge of the bye-laws; but the defendant might have pleaded (*n*)." But if the allegations in the bill re-

(*i*) *Ante*, p. 131.

(*k*) *Curzon* v. *De la Zouch*, 1 Swans. 192; *Nelini* v. *Newton*, 4 Madd. 253, n.; 10 Ves. 449; *East India Company* v. *Neave*, 5 Ves. 185.

(*l*) 11 Ves. 305; 15 Ves. 378.

(*m*) *Honeywood* v. *Selwin*, 3 Atk. 276.

(*n*) *Paxton* v. *Douglas*, 16 Ves. 242.

present the transaction as illegal under the bye-laws, the defendant will be relieved from the necessity of setting them out (*o*).

Section 4.

Of the Exception to the Rule where the Discovery is Immaterial.

It is the province of the master to determine whether the interrogatories are liable to objection on the ground of immateriality. Upon a question which arose, whether the master, upon exceptions for insufficiency, could consider the materiality of the discovery, Sir Thomas Plumer, V. C., entered very fully into an examination of the practice upon this point. "In the absence of authority," he says, "I considered it important to consult the masters for information as to their usual course of practice in this respect, and I have therefore inquired of them, and they have all, without one exception, stated their uniform practice to be, that, if the questions are quite immaterial, they disallow the exceptions; but, if the discovery can in any way assist the plaintiff, they allow the exceptions. In addition to the authority of the gentlemen filling these offices, and who are all of great character and experience, though it is stated in Lord Redesdale's book that a plaintiff is

(*o*) *Paxton* v. *Douglas*, 19 Ves. 225.

entitled to discovery of matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree, yet I have further thought it my duty to communicate with that learned lord himself, who expressed to me that he had not the least doubt that the constant uniform practice of the court of Chancery in all his time concurred with that of the court of Exchequer, and with the opinion of the masters. It may also not be amiss to notice the introduction to every answer which expresses the answer to be to so much as is material for the defendants to answer." "What would be the consequence," he continues, "of driving every pleader to demur. It would be impossible, with the greatest skill, to do so in a case like the present: must there be forty-nine demurrers, or one demurrer to forty-nine questions? where, if the defendant answers to anything, he overrules the demurrer: and the material and immaterial parts of a bill, if artfully constructed, are so mixed up as to make it almost impossible to separate and analyze what may be demurred to from what may not. Although, therefore, I have always been excessively cautious and attentive upon the subject of the practice of this court, lest I should be biassed in the long experience I had in another court of equity, where they are constantly deciding on immateriality against exceptions, and where such decisions, from the injunction which follows, are frequently of the greatest value and importance, and as to which practice there I never remember a doubt

being entertained during the period of between twenty and thirty years which I practised there, yet I am clearly of opinion that the practice of the court of Chancery in this respect is the same. No inconvenience has been known to arise from it, or it would have been corrected by appeal; and I wish, therefore, as far as lies in my power, to put the practice out of all doubt (*p*)."

This has since been settled by an order of court. It is directed, "that the master, in deciding on the sufficiency or insufficiency of any answer or examination, shall take into consideration the relevancy or materiality of the statement or question referred to (*q*)."

Section 5.

Of the Exception to the Rule where the Evidence is in the Knowledge or Possession of the Defendant, owing to his sustaining some Confidential or Privileged Character.

It has been seen, that, where the protection is claimed on the ground of privilege or confidence, there is an important distinction in its extent, according as the discovery is sought from the principal

(*p*) *Agar* v. *Regent's Canal Company*, Coop. 212, 215. See *Scott* v. *Mackintosh*, 1 Ves. & B. 504, in arg. As to the cases in which the objection is applicable, see *ante*, p. 157.

(*q*) Order LXXIV., 3rd April, 1828; *Codrington* v. *Codrington*, 3 Sim. 523.

or from the professional agent or adviser (*r*). If the counsel or solicitor be made a defendant, it appears to be wholly unimportant, at least on the point of discovery, in what form he objects to answer with regard to matters which are within the ordinary scope of professional business. "He is not only justified in withholding such matters," said Lord Brougham, "but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness (*s*)." The master may judge of the propriety of this objection, in considering the question of sufficiency (*t*); and where the defendant cannot meet the entire bill by a plea or a general demurrer (*u*), the most expedient course will probably be to submit the objection by way of answer, rather than by pleading or demurring to any particular portion of the bill.

When the communication for which the protection is claimed is within the rule which has been stated (*v*), and the defendant is himself the client or principal party, it seems equally unnecessary to resort to a demurrer or plea. Documents of this character will not be ordered to be produced, if they are properly described in the answer or in the schedule to the answer (*w*); and if the order has been obtained,

(*r*) Part III. Chap. III. p. 163.

(*s*) *Ante*, p. 165; *Greenough* v. *Gaskell*, 1 Myl. & K. 99; *Stratford* v. *Hogan*, 2 Ba. & Be. 164.

(*t*) 2 Ba. & Be. 164.

(*u*) *Ante*, p. 167.

(*v*) *Ante*, p. 175.

(*w*) 6 Madd. 47; 3 Sim. 396, 488; 1 Myl. & K. 97; 1 Y. & J. 179.

owing to the specific ground of objection not having been assigned, the defendant may still move, upon affidavit, to discharge so much of the order as would compel the production of such communications (*x*).

No instance is reported in which the protection has been sought in respect of oral communications, but with regard to these it would seem that the principle must be the same (*y*).

Section 6.

Of the Application of the Rule to the Evidences of the Defendant.

It has been seen, that evidences which are comprehended under this title, cannot be within the general principle of discovery (*z*). The plaintiff has no equity to call for the inspection of the defendant's evidences or for any information concerning them. It often happens, however, that the defendant is interrogated by the bill with regard to matters the disclosure of which is not necessary to the proof of the case upon which the plaintiff founds his claim. The present question is, whether, supposing the defendant does not demur or plead to such charges, he may by answer resist the answering of interrogatories of this nature.

(*x*) *Hughes* v. *Biddulph*, 4 Russ. 190.

(*y*) *Ante*, p. 179.

(*z*) *Ante*, p. 187.

In a case before Lord Hardwicke, where exceptions were taken to an answer for not setting out what deeds and writings the defendant had relating to his own title, and the master had allowed the exceptions, the lord chancellor allowed the exception to the report; "for that you cannot come by a fishing bill in this court and pray a discovery of the deeds and writings of the defendant's title. If, indeed, there was any charge in the bill, general or special, that defendant had in his power deeds and writings of the plaintiff's title, an answer must be given thereto (*a*)."

Where the defendant claimed as heir-at-law, and the bill interrogated him as to the ancestor or ancestors under whom he claimed, and in what parish each and every of the persons by or through whom the defendant claimed to be heir-at-law of the testator was or were born, and in what parish each and every of such persons was or were baptized, married, and buried respectively, the defendant not only did not protect himself from answering as to the particulars of his pedigree by plea or demurrer, but he did not even submit by his answer that he should be protected from that discovery; and his answer, with regard to these particulars being excepted to for insufficiency in some minute points, the exceptions were allowed. It is true the judgment of Lord Commissioner Eyre is not founded upon this distinction, for he is reported to have said, "that he should be

(*a*) *Buden* v. *Dore*, 2 Ves. 37. See 11 Ves. 73, 76, *per* 445; *Stroud* v. *Deacon*, 1 Ves. Lord Eldon.

glad to take advantage of the rule that Lord Thurlow had laid down, in particular cases, and apply it to all, that, wherever the party is not obliged to answer the interrogatories put, he must take advantage of it by demurrer (*b*)."

It should be observed, that the rule with regard to answering fully a bill which the defendant has submitted to answer, is not a modern rule. It is an ancient course of proceeding, identified with the immemorial practice of the court. It applies to all general objections to the discovery as incidental to the defence in the suit. A temporary innovation upon the rule was admitted in modern times, and the difficulties which grew out of that innovation afforded an example of the inconvenience of confounding the defence to the relief with the defence to the discovery. But at no period does it appear that the answer was understood to preclude the defendant from raising every special objection to discovery which his situation required. He is not permitted to say, 'I will not answer, because you have no title to relief against me at law or in equity,' for he has passed that stage of the cause in which such an objection is appropriate; but he may say, in any stage of the cause, 'I am not bound to make this discovery, even admitting your title were as you have asserted.'

The defendant may demur to questions relating exclusively to his own title (*c*), but it may also hap-

(*b*) *Selby* v. *Selby*, 4 Bro. jun. 679; *Wilson* v. *Foster*, 1 C. C. 11. *Ante*, p. 205, n. (t). Younge, 281.

(*c*) *Ivy* v. *Kekewick*, 2 Ves.

pen, that the forms of the court prevent him from pleading or demurring. The authority of Lord Hardwicke, that he may insist upon the same objection by answer, is not opposed by the decision upon the case before Lord Commissioner Eyre, although it is not consistent with the terms in which the judgment is reported to have been expressed.

It may be said, that the master is compelled in such cases to allow exceptions, and that the inconvenience and incongruity alluded to by Lord Eldon as the consequence of such a practice, constitute an objection to it (*d*).

It is perhaps not perfectly clear, that the master is bound to allow exceptions to interrogatories, the answers to which cannot, by any possibility, tend to *affirm* the plaintiff's case (*e*). Admitting, however, that he is under this necessity, the plaintiff can have little cause of complaint that he has incurred the expense of the judgment of the master and of the court in pursuing a discovery so obviously foreign to the proof of his own title; and there does not seem to be an inconsistency in holding, that though the fact of insufficiency exists, and is certified by the master, yet, it does not follow that the defendant's evidence must be disclosed.

It is a principle, that the production of papers which are referred to and incorporated in the answer, is a part of the discovery which a plaintiff submitting

(*d*) *Ante*, p. 248.

(*e*) *Codrington* v. *Codrington*, 2 Ves. 445. 3 Sim. 519. They were, however, allowed in *Buden* v. *Dore*,

to answer submits to make (*f*). It is, therefore, important to inquire into the application of the present rule, with regard to the production of documentary evidence.

It is necessary here to distinguish the effect of an answer to a charge imputing to a particular document a certain effect, and an answer to a charge that the defendant is in possession of a certain document. It is one thing to allege that an instrument is of a certain import, and another thing to allege that the instrument is in the defendant's custody or power. If it be charged that a deed was executed containing covenants or provisions tending to establish the case of the plaintiff, the defendant is bound to answer that charge (*g*). If it appear by his answer that there is a deed with the alleged clauses, that admission incorporates the deed in the answer; and the further admission that the defendant is in possession of the deed, enables the court to order its production, and thereby render the answer complete. But, where there is a general charge of the possession of documents relating to the subject, and the answer merely admits the possession of certain relevant documents, describing them in a schedule, it is no necessary implication that they tend to support the case of the plaintiff. Although the defendant has not, by demurrer or plea, insisted upon any ground of protection, he is

(*f*) *Unsworth* v. *Woodcock*, 3 Madd. 432.

(*g*) *Stroud* v. *Deacon*, 1 Ves. 37.

not therefore precluded from withholding those which relate exclusively to his own title (*h*). "Where," it was said in a late judgment, "the documents are not referred to, but are admitted to be in the defendant's possession, there the question, whether the defendant shall produce them or not, is determined by considering whether the documents do or do not relate to the title of the plaintiff (*i*)." In such cases, if the documents are described in the answer as evidencing the title of the defendant, and nothing appears in any part of the answer from which it can be inferred that they evidence the title of the plaintiff (*k*), or from which the conclusiveness of the description that the defendant has given of them is impugned (*l*), the present rule has no operation to compel the production of documents so described.

Section 7.

Of the Application of the Rule to matters which are contained in Books and Documents, or which can be in the Knowledge of the Defendant only by reference to Books and Documents.

A distinction has been attempted to be made between matters which are contained in books and do-

(*h*) *Tyler* v. *Drayton*, 2 Sim. & St. 309; *Lady Shaftesbury* v. *Arrowsmith*, 4 Ves. 66.

(*i*) *Hardman* v. *Ellames*, 2 Myl. & K. 756.

(*k*) *Bolton* v. *Corporation of Liverpool*, 3 Sim. 490.

(*l*) Part III. Chap. IV. Sect. 6, p. 237.

cuments, and matters which are to be answered as being in the immediate and personal knowledge of the defendant himself; but Sir J. Leach, V. C., observed, "I can make no such distinction. The plaintiff might compel the defendant to set out the contents of the books in his answer, and the production of the books is a part of the discovery, which the defendant submitting to answer, submits to make (*m*)."

The distance of the place in which the books or documents may happen to be, seems to be wholly unimportant, except as a matter of consideration for the court in allowing the defendant a reasonable time to produce them. "The defendant," said Lord Eldon, in a case before him, "admits that he has in his possession, custody, or power, a number of accounts, letter-books, &c., the particulars of which he has set forth in a schedule to his answer; and he goes on to state, that he believes a number of books, accounts, &c., are in the island of *Tobago*, or elsewhere in the *West Indies*, but he does not state whether the last-mentioned books of account, &c. are in his possession, custody, or power. The omission is extremely material; for if the defendant had admitted the books, &c. in the *West Indies* to be in his possession, custody, or power, the plaintiff might have made a motion, calling upon the court to order the defendant to produce all the accounts, books, &c., as well those mentioned in the schedule, as

(*m*) *Unsworth* v. *Woodcock*, 3 Madd. 432.

those in the *West Indies*, and the court would have done so, at the same time making this distinction, namely, it would have ordered those in the schedule to be produced forthwith; but, with respect to those in the *West Indies*, it would never have done so absurd a thing as to call for them immediately, but would have ordered the defendant to bring them here within a reasonable time; and if he had not got them here within a reasonable time, would have considered it the same as if he had had them here in the first instance and had refused to produce them (*n*)." In another case, where the books were stated to be in the *East Indies*, the defendant being an executor, Lord Eldon ordered that attested copies of all the entries in the books and papers relating to the estate should be brought into court within six months. "When," he observed, "I say six months, I consider at the same time that he may not be able to do it within that time: but, if an executor, instead of being able at the end of twenty-one years to put in an answer which will enable the court to say to him, bring into court so much money, states in his answer that the reason why he cannot give a sufficient answer is, that he administered this estate from 1791 to 1809 in *India*—that he came here in 1809—that he left behind him every paper, book, and account—and that he has no memory of the particulars and items of an estate administered

(*n*) *Farquharson* v. *Balfour*, 1 Turn. & Russ. 190. See *Hornby* v. *Pemberton*, Mos. 58; *Gabbett* v. *Sir Henry Cavendish*, 3 Swans. 267, n.

under his own observation from 1791 to 1812;—I own it does appear to me to be the duty of the court to put him under the necessity of coming to the court from time to time to shew that he has done his utmost to supply his own defect, and that, if it is necessary to have the time enlarged, the application should be made by him for that purpose (*o*)."

In order to found a motion for the production of documents, it must be admitted by the answer of the defendant that they are in his possession, custody, or power (*p*). If a person, who is not a party to the suit, has a deed in his possession, he may be served with a *subpœna duces tecum*, and if he then neglects to produce it, it may be proved by affidavit that he has it, and he may be put in contempt. But if a *party* is to produce a document, it must be shewn by his answer that he has admitted himself to have it (*q*). Without this admission, a mere reference to the document (*r*), an admission of execution (*s*), a description of the instrument (*t*), or an admission that it was in the power of the defendant at a time past (*u*), is insufficient; for if an order for production were made, and the defendant refused to

(*o*) *Freeman* v. *Fairlie*, 3 Mer. 44.

(*p*) *Darwin* v. *Clarke*, 8 Ves. 158; *Erskine* v. *Bize*, 2 Cox, 226; *The Princess of Wales* v. *The Earl of Liverpool*, 1 Swans. 121.

(*q*) *Barnett* v. *Noble*, 1 Jac. & Walk. 228.

(*r*) 1 Swans. 121.

(*s*) 8 Ves. 158.

(*t*) 2 Cox, 226.

(*u*) *Heeman* v. *Midland*, 4 Madd. 391.

produce the instrument, the court would find itself unable to apply its process for enforcing obedience, because no *constat* appears on the pleadings, that the instrument is in the possession of the defendant, and that he has the power to obey (*v*).

If the books referred to are the books of a banker or tradesman, which are in daily use, upon the statement in the answer, or the affidavit of the defendant, of this fact, they will not be taken out of his custody, but such an inspection will be directed as the circumstances may require (*w*).

When papers are ordered to be produced, and deposited in the hands of the clerk in court, the meaning of the order is, that the papers themselves shall be delivered into the possession of the clerk in court, to be open to the view of the plaintiff whenever he pleases; and it is not an obedience to that order, if they are deposited in the office locked up in a box, the key of which remains in the hands of the defendant's solicitors, with notice to the solicitors of the plaintiff that they will attend with the key whenever an appointment should be made for an inspection. The order proceeds upon the idea, that the court can place that confidence in their officers that they will suffer no waste or destruction to be committed (*x*).

It would seem that a defendant cannot excuse himself from answering fully, owing to the labour

(*v*) 1 Swans. 123.

(*w*) *Gerard* v. *Penswick*, 1 & Y. 457.

(*x*) *Preston* v. *Carr*, 1 M'Clel. Swans. 535; 3 Swans. 267, n.

which may be indispensable to such an answer. If there are large chests of papers in his possession or power, he may be required to examine them all, in order to schedule them (*y*); and if a bill be against a partnership, and one of the partners is a stranger to the subject in question, and for some years has not personally interfered in the management of the business carried on in the joint names of himself and partners, he may yet be interrogated as to his own inspection of the co-partnership books, and the result of that inspection; but whether, in such circumstances, he would be compellable to look into the partnership accounts, for the purpose of answering as to his own knowledge, was not decided in the case referred to (*z*).

Section 8.

Of Answers to General Charges, and of Interrogatories which do not require to be Answered.

A distinction has always been taken between a charge of particular facts, and a charge in general language (*a*). The charge of general combination is unimportant, for a charge of lawful combination ought to be specific to render it material (*b*).

(*y*) *Gabbett* v. *Sir Henry Cavendish*, 3 Swans. 267, n.

(*z*) *Seeley* v. *Boehm*, 2 Madd. 176.

(*a*) *Day* v. *Drake*, 3 Sim. 70; 5 Madd. 330. See Beames' El. Pl. 248.

(*b*) *Smith* v. *Snow*, 3 Madd. 11; *Oliver* v. *Haywood*, 1 Anst. 82; Ld. Red. Tr. 41.

If there are several defendants, and the bill is demurrable as against some of them for want of interest, the general charge that the defendants have in their power deeds and papers, neither supports the bill as against them, nor requires an answer, but is rather to be referred to a possession of the confederates, according to their rights and interests (*c*).

A charge of fraud must be pointed, and not a general charge (*d*). "It is not by calling certain transactions by the name of fraud, that compels me to say the fraud is so clear as to overrule the demurrer (*e*)."

The interrogating part of a bill must be construed according to the alleging part, and is not to be considered more extensive than the propositions out of which the interrogatories arise (*f*). The interrogating part of the bill was originally used only to compel a full answer to the matters contained in the former part of the bill, and must be founded on those matters. "Therefore, if there is nothing in the prior part of the bill to warrant an interrogatory, the defendant is not compellable to answer it: a practice necessary for the preservation of form and order in the pleadings, and particularly to keep the

(*c*) *Lloyd* v. *Lander*, 5 Madd. 291. And see the distinction between *general* and *special* allegations, Part I. Chap. II. Sect. 5, p. 37.

(*d*) *Palmer* v. *Mure*, Dick. 490.

(*e*) *Per* Lord Abinger, *Tarleton* v. *Hornby*, 1 Y. & Coll. 194.

(*f*) *Muckleston* v. *Brown*, 6 Ves. 62; 1 Ves. 538.

answer to matters put in issue by the bill (*g*)." Where the bill charged the defendant with knowledge of the existence of a certain deed, and that "in case it has been torn, defaced, burnt, obliterated, cancelled, destroyed, or made away with, that was done by or with the privity of the defendant to defraud the plaintiff;" Lord Rosslyn held, that this did not constitute a charge of spoliation requiring an answer (*h*).

Upon the charge of a general fact, the plaintiff may, however, interrogate as to all the circumstances, when, where, &c., that are material to make it out; and it is not necessary to load the bill by adding to the general charge, that so it would appear if the defendant would set forth when, where, &c. (*i*). A variety of questions may be founded on a general charge, if they are relevant to it. "If a bill is filed against an executor for an account of the personal estate of his testator, upon the single charge that he has proved the will, may be founded every inquiry which may be necessary to ascertain the amount of the estate, its value, the disposition made of it, the situation of any part remaining undisposed of, the debts of the testator, and any other circumstance leading to the account required (*k*)." The proposition is different where the circumstances in the interrogating part are attended with distinct

(*g*) Ld. Red. Tr. 45.

(*h*) *Jerrard* v. *Saunders*, 2 Ves. jun. 458.

(*i*) *Faulder* v. *Stuart*, 11 Ves. 301.

(*k*) Ld. Red. Tr. 45.

legal consequences, not included in the charges or allegations (*l*).

Section 9.

Of Answers which cannot be Excepted to for Insufficiency.

The attorney-general, in his answer to a bill in equity, may state anything which he means to prove; but he cannot be called upon to answer further, for he is only to protect the interest of the crown (*m*). And where exceptions were taken to the formal answer put in by the attorney-general to a cross-bill, for the discovery of matters alleged to be material to the defence to an information, it was held that the discovery was in the discretion of the attorney-general (*n*).

"I am not prepared to say," said Lord Abinger, in a recent case, "that a bill of discovery has ever been filed, or could upon principle be sustained against the attorney-general for a discovery of matters that can be in neither his personal nor official knowledge, or that the crown would be bound, through the medium of the attorney-general, to make that discovery. At the same time it has been the practice, which I hope never will be discontinued, for the officers of the crown to throw no difficulty in

(*l*) *Bullock* v. *Richardson*, 11 Ves. 376.

(*m*) 5 Pri. 398.

(*n*) *Davison* v. *Attorney-General*, 5 Pri. 398.

the way of any proceeding for the purpose of bringing matters before a court of justice, where any real point of difficulty that requires judicial decision has occurred. Hence there are a great variety of cases where bills of this sort have been filed, in which the attorney-general has been a party; and one case has been referred to, where it appears that the attorney-general did set forth a full answer (*o*). There the treasury desired that the question might be brought before the judicial consideration of some court of justice; and it was very clear, when once the court thought that it ought to have jurisdiction over the subject-matter, that it did not become the attorney-general to urge any form in opposition to it; otherwise, I think it would be a very difficult thing to say, that a mere bill of discovery might be filed against the attorney-general, instead of putting the party to his petition of right, which is the proper remedy against the crown, where he claims a specific relief against the crown (*p*)."

It is a general rule, that a discovery cannot be compelled from an infant (*q*). "In the case of an infant the answer is expressed to be made by his guardian, and the general saving at the beginning, together with the denial of combination, and the

(*o*) *Crauford* v. *Attorney-General*, 7 Pri. 1. See also *Colebrooke* v. *Attorney-General*, 7 Pri. 192.

(*p*) *Deare* v. *Attorney-General*, 1 Y. & Coll. 208.

(*q*) 2 Ves. 494; 5 Pri. 398; *Savage* v. *Carroll*, 1 Ba. & Be. 553; *Copeland* v. *Wheeler*, 4 Bro. C. C. 256; *Lucas* v. *Lucas*, 13 Ves. 274.

traverse at the conclusion, common to all other answers, are omitted. For an infant is entitled to the benefit of every exception which can be taken to a bill, without expressly making it; he is considered as incapable of the combination charged in the bill; and his answer cannot be excepted to for insufficiency (*r*)."

Where a defendant in ejectment filed a bill in aid of his defence, and obtained an injunction to restrain the action in the meantime, the injunction was continued until the infant heir of one who had a common interest with the plaintiff was made a party to the suit; for it was said that he might have some documents relating to the question (*s*). It has, however, been held, that the charge of books and documents having come to the hands of the infant, does not affect the general rule which exempts him from the necessity of discovery (*t*).

Section 10.

Of Cases where a full Answer may be Deferred until the Defendant has had liberty to Inspect Books or Documents in the Possession of the Plaintiff.

The interlocutory orders which may be obtained by a defendant are not in the nature of relief to him,

(*r*) Ld. Red. Tr. 314; 3 P. Anst. 77.
Wms. 237. (*t*) *Strudwick* v. *Pargiter*,
(*s*) *Hardcastle* v. *Shafto*, 1 Bunb. 338.

but are conditions annexed to the relief given to the plaintiff (*u*). And if the defendant seeks discovery from the plaintiff, he is under the necessity of filing a cross bill (*v*). There are, however, cases in which the court has stayed proceedings against a defendant until he has been afforded the opportunity of inspecting papers which are in the hands of the plaintiff. This is, in fact, imposing terms upon a compliance with which only the process of the court is issued.

"Where," said Lord Eldon, "the executors of a deceased partner, filing the bill for an account, have got all the partnership books and accounts, as the defendant verily believes, (for he cannot carry it farther, and to that for this purpose it must be carried), the defendant, by his answer, swearing that he cannot put in a better answer, as he has not the partnership books and accounts; that, it is true, ought to be sufficient;—but, as it tends to the delay of justice, and to perplexity;—and as a cross bill must be for an account as well as discovery,—I think I remember this kind of motion by the defendant, stating by his answer that the bill calls for a discovery, which he cannot make completely without seeing the partnership books and accounts, and he verily believes those books and accounts, to the joint possession of which both are entitled, are in the hands of the plaintiff;

(*u*) *Wynne* v. *Griffith*, 1 Sim. & St. 147.

(*v*) *Anon.* 2 Dick. 778; *Micklethwaite* v. *Moore*, 3 Mer. 292. See *Wiley* v. *Pistor*, 7 Ves. 411; *Odam* v. *Duke of Grafton*, Bunb. 243.

that the court would stay proceedings against him for not putting in his answer until he has been assisted with that inspection. That sort of motion will do without a cross bill (*w*)."

There are cases in which a defendant may obtain, upon affidavit before answer, an inspection or a copy of a written instrument, upon which the plaintiff founds his demand. If the plaintiff has not said, what by his bill he may say, that he has left the instruments in the hands of his clerk in court, in order that the defendant might inspect them, and has not prayed, as the ancient bills used to pray, that, after inspection, the defendant may answer the interrogatories applied to that subject, the general rule of the court has been, that the defendant must file a cross bill to obtain discovery of those deeds (*x*). The party cannot, however, have an answer to a cross bill till he has himself answered the original bill. "If," said Lord Eldon, "there is a necessity, therefore, that he should have production before answer, a necessity founded on special circumstances clearly manifested, the rule of the court would work injustice, unless it admitted relaxation and exception. That such an exception was long ago contemplated, is clear from a passage in the original text of the *Practical Register*, a book of considerable authority, in which it is said—'Where a deed in the plaintiff's hands, mentioned in the plaintiff's bill, was necessary to the defendant's making in his defence a full answer, the

(*w*) *Pickering* v. *Rigby*, 18 Ves. 484. (*x*) 1 Swans. 123.

court ordered the plaintiff should give him a copy of it (*y*);' and it seems to me, that, if no authority could be produced, the obvious justice of such a position would well authorize the court to make a precedent upon the subject. There is no general rule with respect to the practice of this court that will not yield to the demands of justice (*z*)."

In the case in which these observations were made, the bill was against executors, and stated that two promissory notes had been given by the testator for securing payment of a certain sum of money. On the affidavit of one of the executors that he had inspected the first note; that there appeared on the face of it circumstances tending to impeach its authenticity; that he was informed and believed that the second note had been produced by the plaintiff for payment in a foreign country; and that he was advised and believed that it was necessary, in order that his answer might fully meet the case, that he should before answer have inspection of the second note; it was ordered that the defendants should have a fortnight's time to answer the plaintiff's bill, to be computed from the time that the plaintiff should have produced and left in the hands of her clerk in court the second promissory note (*a*). It was remarked, that, in the courts of common law,

(*y*) P. 161, Mr. Wyatt's edition.

(*z*) 1 Swans. 125; *Attorney-General* v. *Brooksbank*, 1 Y. & J. 439; *Foreman* v. *Cooper*, 11 Pri. 516.

(*a*) *The Princess of Wales* v. *The Earl of Liverpool*, 1 Swans. 114, 580. But see 5 Sim. 410.

where a plaintiff in the declaration founds his demand on a written instrument, as a promissory note, those courts would give to the defendant inspection of that instrument, in order that he might see by whom it was written, whether on a stamp, and with the other requisites (*b*).

It would seem, however, that to impeach the authenticity of an instrument by merely negative allegations, without stating any special circumstances having that effect, does not raise a sufficient ground for production. Where the bill sought specific performance of an agreement alleged to have been made by a testator for the conveyance of an estate that he had devised to the defendants, a motion for production of the agreement was supported by affidavits made by the defendants, one of whom was a daughter of the testator, and had lived with him; in which they deposed that they had never heard, and did not believe that the testator had ever entered into any such an agreement; that they believed it to be a forgery; and that they were unable fully to answer the bill, without first being permitted to have an inspection of the agreement.—An order was made for time to answer until a fortnight after the production of the agreement; but the order was subsequently discharged by Lord Eldon (*c*).

(*b*) *Per* Lord Eldon, 1 Swans. 123; *per* Lord Brougham, 1 Myl. & K. 92, 93; Tidd, Prac. 591, 9th ed.; *Barry* v. *Alexander*, 4 Doug. 16. As to policies of insurance, see 19 Geo. 2, c. 37, s. 6; Annuity deeds, 54 Geo. 3, c. 141.

(*c*) *Jones* v. *Lewis*, 2 Sim. & St. 242; 4 Sim. 324.

It is not enough for a defendant, who does not allege any affirmative or special grounds for production, to make an affidavit that he cannot put in a full answer without an inspection of the documents, if it appears that he may put in a *sufficient* answer. He is at liberty to call upon the plaintiff to produce them; and if the plaintiff refuses, he cannot complain that the answer is insufficient. "If the defendant requires them for the purposes of his *defence* in the suit, he ought to file a cross bill against the plaintiff for a discovery of them (*d*)."

(*d*) *Per* Sir L. Shadwell, V. C., *Penfold* v. *Nunn*, 5 Sim. 410.

CHAPTER II.

OF DEMURRER AND PLEA TO DISCOVERY.

IT has been stated under the preceding rule (*a*), and in an earlier part of the present treatise (*b*), that every defence of which the position is, that, from some objection in form or substance, the defendant ought not to be compelled to make any answer, must be taken by demurrer or plea, according as the objection appears upon the bill, or requires to be shewn by stating some fact not appearing upon the bill (*c*). It is said by Lord Redesdale, that "after a demurrer has been overruled, new defence may be made by a demurrer less extended, or by plea, or answer; and after a plea has been overruled, defence may be made by demurrer, by a new plea, or by an answer; and the proceedings upon the new defence will be the same as if it had been originally made (*d*)." And it is held, that after a plea or demurrer has been overruled, the party is not deprived of his equity, for the same matter may be insisted on by way of answer (*e*). These propositions, with reference to the

(*a*) *Ante*, p. 255.
(*b*) *Ante*, p. 127.
(*c*) Ld. Red. Tr. 107, 218.
(*d*) Ld. Red. Tr. 16.
(*e*) 2 Ves. 492; 2 Ves. 357; 1 Swans. 304.

present subject, stand in need of considerable qualification. As to relief, they are generally true; but, with regard to discovery, they are more generally inapplicable.

In the cases to which the general rule extends, that he who submits to answer must answer fully (*f*), the overruling of a demurrer or plea, though it is not conclusive upon the title to relief, is conclusive upon the question of discovery; for it amounts to a decision, that the matter appears to be proper for judicial inquiry, and the defendant can no longer refuse to the plaintiff the means of prosecuting that inquiry (*g*). Upon the special objections to discovery (*h*), the overruling of a demurrer or plea, whether general or of partial extent, is not decisive. The effect of the decision against the demurrer or plea with regard to such objections is, that they cannot be taken by a second demurrer or plea without the leave of the court, but they may still be taken by answer, as they might have been if no previous defence had been attempted (*i*).

The validity of a plea is frequently determined upon considerations apart from the merits of the

(*f*) Chap. I. Sect. 2, p. 255.

(*g*) Part I. Chap. I. Sect. 2, p. 4. Whether a purchaser for valuable consideration, and a defendant who disclaims all interest, are excepted from this principle, must depend on the question of whether the cases of *Jerrard* v. *Saunders*, 2 Ves. jun. 454, and *Neuman* v. *Godfrey*, 2 Bro. C. C. 332, are to be considered as overruled. See Sect. 2, p. 256.

(*h*) Part III. p. 131 et seq.; Part IV. Chap. I. Sects. 3, 4, 5, 6, p. 262 et seq.

(*i*) *Baker* v. *Mellish*, 11 Ves. 73.

case, and it may be objected, that the judgment against the plea on a point of form should not be conclusive upon the discovery. It might impose upon the defendant the necessity of disclosing important matters, with regard to which the plaintiff may, after all, have no concern. This argument seems to possess peculiar force where the bill seeks discovery in aid of a trial at law. The rules with regard to pleading are so essentially different at law and in equity, that it is more easy to point out distinctions than to suggest analogies. The important question of duplicity affords a pregnant example of the difficulty of reconciling their respective forms. The defendant is entitled to be protected from discovery of matters which are not in issue at law (*k*), and for this purpose he must resort to a plea. But it is often impossible to frame his plea in equity sufficiently extensive to cover all such matters, without rendering it *double*, and therefore bad. "The defence," it was argued in one case, "consists of a great number of facts, not of one short fact that might be pleaded, or of a combination of facts involving one point (*l*)." In law there would be no difficulty; the rule there is reciprocal: it applies both to the plaintiff and defendant—to the declaration as well as to the plea. In equity, it is an obstacle to the defendant, and not to the plaintiff—an objection to the plea and not to the bill. In support of the strictness of equitable pleas, it is said that a plea is not the

(*k*) Part II. Chap. I. Sect. 4, p. 47.

(*l*) 11 Ves. 301. See *ante*, p. 27, n. (*e*).

only mode of defence in equity (*m*); but this argument is inapplicable where the bill is for discovery, for then the plea is the only defence; and in such cases discovery is frequently given, in which the event of the cause proves the plaintiff not to have had any interest. This, however, is an inconvenience attending the administration of justice, rather than a defect in the system of equity. The determination of the rights of property which are in dispute is the end: discovery is but the means of eliciting truth for the attainment of that end. It is incidental to litigation, that parties must be sometimes harassed by inquiries with respect to subjects which in the result appear to have been unnecessarily agitated; but against this evil there are many circumstances which operate as safeguards; and the objections which may be taken to the discovery of matters that are immaterial to the question in dispute, or the disclosure of which would be dangerous or prejudicial to the defendant, afford, when they are properly insisted upon, the means of an ample protection.

"A defendant may put in separate demurrers to separate and distinct parts of a bill for separate and distinct causes (*n*)." If, however, a demurrer to a part of the bill be confined to the discovery which is prayed, it can only be founded upon the special objections which have been mentioned (*o*). A plea may also be to part of the bill (*p*). In demurrers

(*m*) Ld. Red. Tr. 296. p. 4.
(*n*) Ld. Red. Tr. 214.
(*o*) Part I. Chap. 1. Sect 2,
(*p*) Ld. Red. Tr. 294.

and pleas of this limited extent, it is necessary to express specifically the parts of the bill which the defendant thereby seeks to avoid answering: it is not sufficient to define the parts to which it extends by way of exception (*q*); for by such a form the court cannot judge how much of the bill is covered by the demurrer or plea, without looking into the answer, and determining whether it is sufficient or not, before the validity of the demurrer or plea can be considered (*r*).

A plea or demurrer which is founded on one of the special objections to discovery is not overruled by an answer to the other parts of the bill which are not liable to that particular objection, although the whole bill might have been demurred to (*s*): in which respect the objections are distinguished from those which are founded on a general ground of defence (*t*).

If a defendant shall have put in a demurrer, but the demurrer has been from any cause overruled, he can take all the objections to discovery which a defendant is permitted to raise by answer; but he cannot put in another or more limited demurrer without leave of the court. When the defendant by

(*q*) But if the bill prays relief with respect to several estates, and the defence does not extend to all, the extent of the plea may be defined by exception—*Howe* v. *Duppa*, 1 Ves. & B. 514.

(*r*) Ld. Red. Tr. 214, n. (h), and cases cited Ib.; Id. 294; 3 Atk. 70; *Salkeld* v. *Science*, 2 Ves. 108; *Chetwynd* v. *Lindon*, 2 Ves. 451; *Mynd* v. *Francis*, 1 Anst. 5.

(*s*) *Mayor of Dartmouth* v. *Seale*, 1 Cox, 416.

(*t*) *Ante*, Sect. 2, p. 255.

answer says that he is not bound to answer, the plaintiff may immediately contest with him whether he has sufficiently answered; but if the defendant were at liberty to demur again, the plaintiff would be placed in a different situation; for the question of sufficiency is then postponed until the demurrer is disposed of (*u*). The court, however, has a jurisdiction, if a fair case is made, to give leave to amend and narrow the demurrer, upon proper terms. "There is a wide difference," said Lord Eldon, "between that and putting the defendant to answer. If demurrer after demurrer can be permitted, it must stop somewhere; and the difficulty is to ascertain at what point. A demurrer to the whole bill being overruled, as too general, there is nothing in the judicial opinion of the court, so delivered, that ascertains why it is too general; and suppose one hundred charges, the defendant may speculate upon ninety-nine. A second time he may be told it is still too general; and then he may try ninety-eight, and answer two. Where is this to stop, until he is driven to the single charge to which the demurrer lies? He may thus upon authority from time to time keep off the issue, or the application of process for want of an answer. If a new rule is to be made, the best seems to be, that, where a demurrer is to be overruled for generality, it depends upon the leave of the court whether the defendant shall put in another demurrer more limited." And his lordship decided accordingly (*v*).

(*u*) *Baker* v. *Mellish*, 11 Ves. 73, 74. (*v*) S. C. 11 Ves. 74.

The inconvenience of permitting the demurrer to be amended, Lord Eldon said, "at the utmost is, that at any time pending the argument on the demurrer, and before the judgment is got into a complete state, even upon the opinion of the court delivered, the question may be submitted to the discretion of the court, whether they will allow the defendant to amend the demurrer; and that discretion puts the defendant in the situation in which it is just to place him, but which the justice due to the plaintiff requires that he should be placed in as soon as possible." Upon a motion by the defendant, in the case which produced these observations, for liberty to demur to so much of the bill as sought a discovery of his title, Lord Eldon gave the permission (*w*). "As to particular questions upon this record," his lordship said, "the defendant should not be called upon to answer, for he is put precisely in the same situation as if he had answered; and, notwithstanding a demurrer to the whole bill overruled, the defendant may object to answer a question, if it is not lawful to ask it, and may by answer protect himself from answering such a question; but whether he should be in that situation is a very different consideration, for, if he says he is not bound to answer, the plaintiff may immediately contest with him, whether he has sufficiently answered; but he is not in that state if at liberty to demur again, until that demurrer is disposed of, and then the ques-

(*w*) S. C. 11 Ves. 76.

tion as to the sufficiency of the answer upon the other points is to commence (*x*)." "The question upon the whole is, whether it is as convenient to justice to permit this demurrer to be argued, as to overrule it, and make the defendant answer. The general demurrer stated a question very fit for the consideration of the court upon demurrer, and integrity was exercised in the whole. If I had been asked for leave to amend the demurrer immediately, I ought to have given leave. It is, therefore, reasonable in this case, that this demurrer should be argued." It was, however, allowed by consent, without argument (*y*).

A second plea might be productive of the same inconvenience, and the leave of the court is necessary to plead in such circumstances (*z*).

A defendant may protect himself from discovery by demurrer *ore tenus* to any part of the bill (*a*), to which he has demurred (*b*) upon the record, if the ground of demurrer assigned upon the record should be insufficient (*c*).

The principle is the same, whether the court has determined that the bill is such as the defendant

(*x*) Id. 73.

(*y*) Id. 76.

(*z*) 1 Sim. & St. 511; *Hudson* v. *Hudson*, Id. 512, n. (*g*). As to filing exceptions *nunc pro tunc* after plea overruled, see *Noel* v. *Ward*, 1 Madd. 343.

(*a*) *Pitts* v. *Short*, 17 Ves. 215; 14 Ves. 248; 6 Ves. 780; 11 Ves. 72; 2 Madd. 302; 1 Sim. & St. 63.

(*b*) *Hook* v. *Dorman*, 1 Sim. & St. 231.

(*c*) *Cartwright* v. *Green*, 8 Ves. 408; 1 Swans. 288; 1 Anst. 4; 11 Ves. 72; Beames' Ord. Cha. p. 174; Ld. Red. Tr. 217.

must answer, or whether the defendant has by his own conduct precluded himself from raising that question (*d*). It does not seem that any relaxation of the rules of pleading where there is a plea or an answer, is made in favour of a defendant who is thus debarred from the defence by demurrer (*e*). If the defence be that the plaintiff has shewn by his bill no title to relief, the rules of the court require a demurrer before the defendant comes to ask for time to plead, answer, or demur, not demurring alone (*f*). Having placed himself in a situation in which he cannot demur alone to the discovery or relief, the defendant cannot be allowed to discover what he pleases, and refrain from discovering the rest, by insisting in an answer upon the objection which ought to have been raised by demurrer (*g*).

(*d*) *Taylor* v. *Milner*, 11 Ves. 42; Ld. Red. Tr. 208, et seq.

(*e*) Ld. Red. Tr. 208, et seq. See Id. 211, n. (*y*).

(*f*) *Dolder* v. *Lord Huntingfield*, 11 Ves. 294.

(*g*) 11 Ves. 295; *Sherwood* v. *Clark*, 9 Pri. 259.

CHAPTER III.

OF THE FORM OF OBJECTING TO DISCOVERY IN THE EXCHEQUER.

THE rule in Chancery, that a defendant who submits to answer must answer fully, does not apply generally in the court of Exchequer. The inconvenience and inconsistency which have been adverted to as the consequences of the temporary innovation upon the ancient practice of the former court (*a*), do not occur in the latter; for in the Exchequer the exceptions for insufficiency are argued before the court in the first instance (*b*). There seems, however, to be some want of uniformity in the principle upon which the sufficiency of answers has been determined. The statement of the present rule in the Exchequer will be much assisted by referring to that which was adopted in the court of Chancery during the suspension of the usual practice there (*c*).

It is to be observed, that the distinction in the two courts of equity, is a distinction of form and not of substance. The principle expressed by Sir J.

(*a*) *Ante*, p. 248.
(*b*) 13 Pri. 635; 13 Pri. 772; 15 Ves. 377; 4 Bro. C. C. 12.
(*c*) *Ante*, p. 250.

Leach, V. C., is universally applicable to the jurisdiction:—"A defendant cannot by answer deny the plaintiff's title, and refuse to answer as to facts which may be useful evidence in support of that title (*d*)." And the same may, with equal truth, be said of a plea (*e*). The cases in which the difference of practice chiefly prevails, are where the defendant denies the title which the plaintiff alleges, and upon that denial resists the discovery of matters which are merely a consequence of the alleged title (*f*).

It was held by Lord Chief Baron Parker, that where the bill sought an account or discovery of assets, if the fact upon which the plaintiff founded his title were denied, and if it were a fact lying in the knowledge of the defendant, the plaintiff was not entitled to a discovery of assets; but if the fact did not lie in his knowledge, though he denied it, yet he should set out an account (*g*). This decision imports, that a defendant cannot protect himself from setting forth an account unless he possess a personal

(*d*) 3 Madd. 72; *Mant* v. *Scott*, 3 Pri. 477.

(*e*) *Ante*, p. 26, et seq.

(*f*) No *partnership*, and therefore no *account* necessary; *Jacobs* v. *Goodman*, 3 Bro. C. C. 487, n.; *John* v. *Dacie*, 13 Pri. 632; *Askham* v. *Thompson*, 4 Pri. 330: but see 13 Pri. 770. A *stated account*, and no discovery of previous transactions; *Capon* v. *Miles*, 13 Pri. 767. There seems to be an exception in the case of a bill for *tithes*; *Whistler* v. *Wigney*, 8 Pri. 1; *Langham* v. ——, Hardr. 130; S. C. *Langham* v. *Sparstowe*, 1 Ea. & Y. 429; *Gumley* v. *Fontleroy*, Bunb. 60; *Randal* v. *Head*, Hardr. 188; *Quilter* v. *Messendine*, Gilb. Eq. R. 228; 11 Ves. 304; 7 Pri. 666; Ld. Red. Tr. 311.

(*g*) *Sweet* v. *Young*, Ambl. 354; Ld. Red. Tr. 311.

knowledge of the facts insisted upon as a foundation of the title, but the distinction does not appear to have been taken in subsequent cases (*h*).

It seems to have been considered in a recent judgment (*i*), that the defence to discovery by way of answer, is more particularly adapted to the case of objections which do not extend to the entire bill. It was said by Graham, B., that "there is often great inconvenience in a plea, and a defendant ought not to be unnecessarily driven to plead in a case of this nature. In the cases cited, there must have been some grave point of equity raised, and to be determined, which, it was supposed, if established, would operate as a bar to the suit; and, in such a case, a plea may be very proper and needful, in order to bring the question distinctly before the court." "In a late case, we held that there was no necessity for splitting the record by insisting on a plea, where a party could sufficiently protect himself by answer from answering certain parts of the bill. That is a sufficient reason for holding that he might do so in this court, without being driven to put his objections on the record by plea, where they do not go to the entire suit. Where indeed the objection would affect the whole merits, it may be very proper to compel the party to put the case upon that single issue by means of a plea." And Lord Chief Baron Alexander observed, "We must take what appears to us to be the most convenient course under the

(*h*) 11 Ves. 305; 2 Sim. & St. 275.

(*i*) *Capon* v. *Miles*, 13 Pri. 770.

circumstances in every case. There are, undoubtedly, many occasions on which a defendant must plead his defence, in order to give it the operation of a bar to the whole bill, as in the instance of a partnership; but that is not applicable to such a defence as this, where the matter insisted on only goes to a small part of the bill. I must say, that I consider the exception should be disallowed."

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LONDON:
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